

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 441

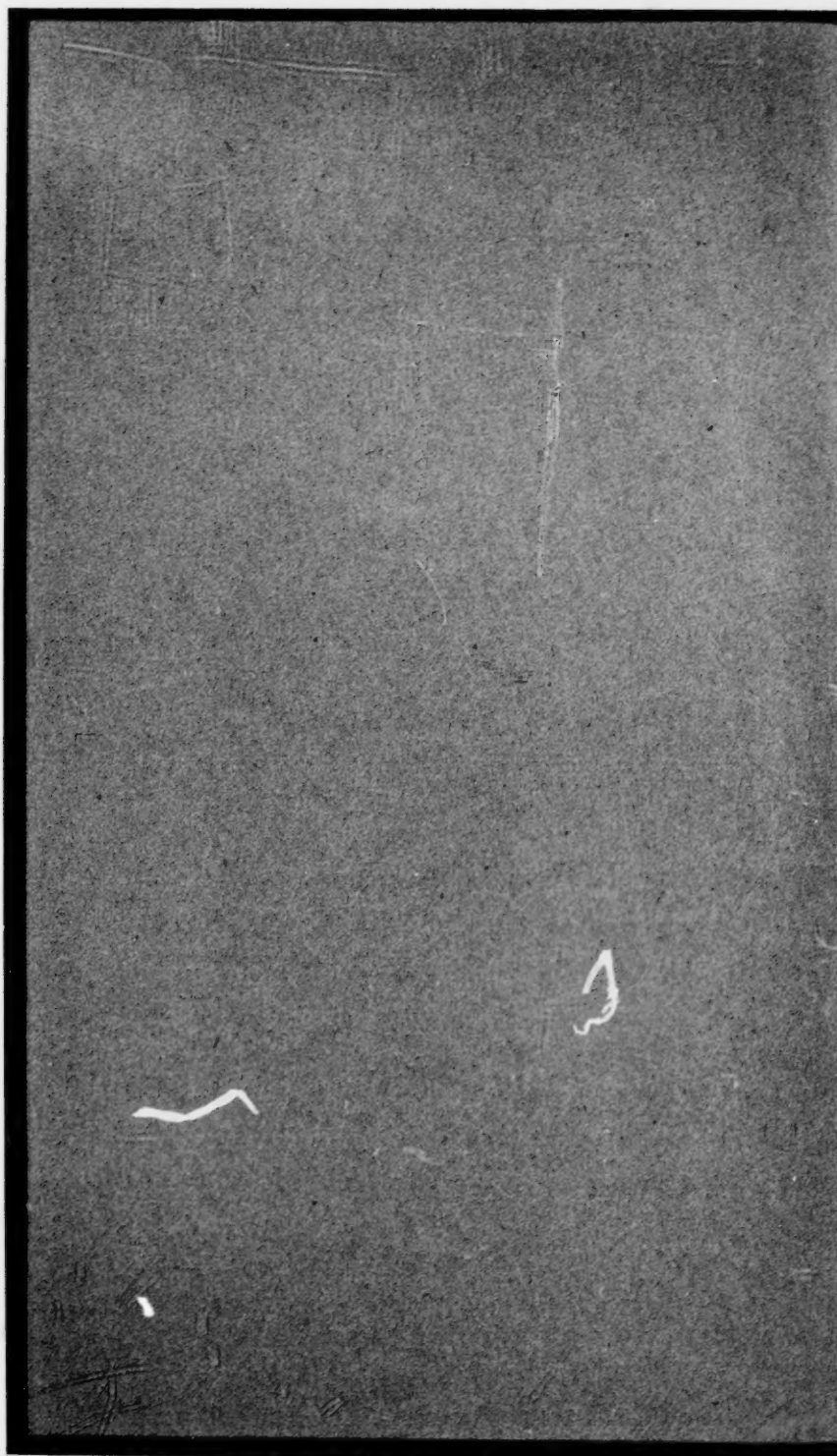
W. S. TYLER COMPANY, APPELLANT

LUDLOW-SAYLOR WIRE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 11, 1914.

(24,161)



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OCTOBER TERM, 1913.

No. 1010.

W. S. TYLER COMPANY, APPELLANT,

vs.

LUDLOW-SAYLOR WIRE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,

vs.

THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York:

The W. S. Tyler Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio and a citizen of said State, having its principal office and place of business at Cleveland, Ohio, Complainant, brings this its bill of complaint against The Ludlow-Saylor Wire Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri and a citizen of said State, and having a regular and established office and place of business at No. 30 Church Street, Borough
2 of Manhattan, City of New York, in the Southern District of New York, where some of the acts of *acts of* infringement hereinafter complained of were committed, defendant.

Thereupon your orator complains and says:

1. That your orator is engaged in the manufacture and sale of wire fabrics of various sorts, including Fourdrinier belts, wire cloth, screens and the like, at Cleveland, in the State of Ohio, where it maintains an office and factory, and that it has been so engaged for the period of about forty (40) years last past. The products of your orator's said factory have been sold in large quantities throughout the United States and elsewhere and your orator has acquired an extended trade in said goods and has established a large and profitable business therein and all of its said products, including the wire screens hereinafter more particularly referred to, have become known throughout this country to the trade and public; that your orator has established and now maintains branch offices and places of business and has numerous agents in various cities in the United States and that by reason of the energetic and vigorous prosecution and development of its business through advertising and the personal efforts of its numerous agents who solicit the retail trade throughout the United States, and also by reason of the careful attention which your orator has given to the quality and workmanship of its various products and the superior character thereof your orator has acquired and now enjoys a recognized and enviable reputation throughout the United States for the excellence of its goods and for the fairness and uniformity of its methods of doing
business.

3 2. That prior to the 27th day of May, 1907, one Morley P. Reynolds was the first and original inventor of a certain new
1-1010

and useful improvement in woven wire fabric for screens not known or used before his said invention thereof nor patented nor described in any printed publication in this or any foreign country before said invention, and not abandoned, nor in public use or on sale in the United States or patented or described in any printed publication in any country for more than two (2) years prior to the date of the application for a patent in the United States as hereinafter mentioned and for which no application for Letters-Patent was filed by the said Morley P. Reynolds or his legal representatives or assigns in any country more than seven months prior to his application, and being so as aforesaid the original and first inventor and entitled to make application for and receive Letters-Patent of the United States therefor, the said Morley P. Reynolds did on the 27th day of May, 1907, make application for Letters-Patent of the United States, in accordance with the then existing laws of Congress, and having duly complied in all respects with the requirements of said laws and having by an assignment in writing dated June 6, 1910, duly executed and delivered and afterwards recorded in the United States Patent Office, transferred his entire right, title and interest in and to said application and the invention thereunder to your orator and requested the Commissioner of Patents to issue the said Letters-Patent to your orator. Letters-Patent of the United States No. 933,599, under seal of the Patent Office and signed by the

Commissioner of Patents, were in due form of law on the 9th day of August, 1910, issued to your orator for said invention, whereby there was secured to your orator, its successors and assigns, for the full term of seventeen (17) years from the said 9th day of August, 1910, the full and exclusive right to make, use and vend to others to be used the said improvement as by the said original Letters-Patent, or a duly certified copy thereof here in Court ready to be produced if required, will more fully appear. A printed Patent Office copy of said Letters-Patent is hereto attached marked "Exhibit A."

3. That by virtue of the premises your orator became on the date of said assignment the sole and exclusive owner of said invention or improvement in screens and ever since said 9th day of August, 1910 has been the sole and exclusive owner of the said Letters-Patent therefor and possessed of the exclusive right and privilege of making, using and vending to others to be used the improved screens described and claimed in the said Letters-Patent and that your orator has granted no licenses thereunder.

4. That during the latter part of the year 1905 or early in the year 1903 your orator began the manufacture of said patented screens and has ever since that time made the same continuously in large numbers and has built up and established a large and profitable trade thereunder; that your orator has used good materials and workmanship in the manufacture of the said screens and for the purpose of identifying the same as of your orator's manufacture devised and adopted certain marks and identifications, to wit, a square sheet-metal tag or plate which was attached to each of the said screens when shipped from your orator's factory and which

5 tags have from the beginning contained certain words and certain peculiar marks, all arranged in a particular manner so as to identify the said screens as of your orator's manufacture; that as first used the said sheet-metal tags contained the words: "Pat. App. For" in addition to certain other marks and designations; that before and after the issuance of your orator's patent your orator continued the use of the said sheet-metal plates or tags and affixed one thereof to each of the screens manufactured under said invention and Letters-Patent; that as so used each of said metal tags has the name of your orator, "The W. S. Tyler Company," the words "Cleveland, Ohio" and the words "Ton-Cap Screen" arranged in horizontal curved lines enclosing a representation of a section of said screen and a raised panel to contain the number of said screen, and after the issue of said Letters-Patent the tag was marked with the number of said patent; that the said tag or plate with the lettering aforesaid and the particular arrangement thereof was of distinctive appearance and was adopted and became known in the trade as your orator's mark by which its goods were identified and that said goods so made and sold under said mark or identification became known and recognized as indicating screens of superior excellence and as made by your orator.

5. That ever since the issuance of the said Letters-Patent your orator has marked the screens made by it under the said Letters Patent No. 933,599 as required by law and thereby has given out notice to the public that the said screens were patented and that the defendant herein has also been specially and particularly notified of the said Letters-Patent and of your orator's exclusive rights thereunder and requested to desist from infringement thereof as herein after complained of.

6. That the public generally has recognized the exclusive rights of your orator in the premises not only by the purchase of said patented screens in large numbers from your orator but also by refraining from infringement upon your orator's said exclusive rights and that but for the infringement of the defendant as hereinafter referred to your orator would be in the undisturbed possession and enjoyment of said exclusive rights; no other person, firm or corporation having infringed thereon save one.

7. That the said defendant, well knowing the premises and all the facts hereinbefore set forth, since the issuance of the said Letters-Patent and the marketing of the screens made thereunder by your orators marked and bearing your orator's marks as aforesaid, prior to the filing of this bill and within six (6) years last past has, at the City of New York and in the Borough of Manhattan, in the District aforesaid, and at various other places in the United States, infringed upon your orator's exclusive rights under said Letters-Patent and upon your orator's said trade mark and has unfairly competed with your orator by selling to the trade large number of screens containing and embodying the improvements and inventions set forth and described in said Letters-Patent No. 933,599, each of said screens having affixed thereto a metal tag or plate bearing certain marks and designs in imitation of your orator's said marks and designs, which

said screens not only infringed upon your orator's exclusive rights under said Letters-Patent, but also violated your orator's rights in that the said infringing screens were made in close simulation and

7 imitation of your orator's said patented screens, both in construction and appearance, and were marked with tags or plates and with letters and designs simulating the appearance of your orator's said goods and that the said defendant, by means of said simulation and marking, sought and intended to mislead and deceive the Public into the belief that the defendant's said screens so made and marked by it were the screens of your orator, and that the defendant's said screens and marks were well calculated to deceive and mislead the public into the belief that the defendant's goods were the goods of your orator and caused confusion in the minds of the Public respecting the origin of the said goods.

8. A sample of the screen manufactured by your orator under and in accordance with the said Letters-Patent and having the said metal plate bearing said marks and other indicia is filed herewith as an exhibit, marked "Complainant's Exhibit, Complainant's Screen," and a specimen of the screen made and sold by the said defendant and sold in this district as aforesaid is also herewith filed, marked "Complainant's Exhibit, Defendant's Screen."

9. That in addition to the metal tags or plates used by your orator in identifying its said screens, your orator has also for several years last past pasted upon the boxes containing the screens printed labels of a special design, color and size, a specimen whereof is hereto attached marked "Complainant's Exhibit, Complainant's Label"; and the defendant has also in the sale of its infringing screens pasted upon the boxes containing the same as shipped from its factory a similar printed label of the same size and color and in every material

8 respect like unto your orator's; that the complainant first adopted and has used as a distinguishing mark or name for its screen the hyphenated words "Ton-Cap" and that the defendant has used the hyphenated words "Rek-Tang," the similar use and arrangement, style and lettering and the like in the two labels further tending to confuse the products of the defendant with those of your orator and operating to the injury and damage of your orator.

10. That the aforesaid acts of the defendant are in violation and infringement of your orator's said Letters-Patent and also in violation of your orator's trade mark and other rights and has caused and is causing your orator great loss and damage; that not only is the defendant's said screen an infringement of your orator's said patent, but that it is also in the marks and dress in which it is offered to the public an infringement of your orator's exclusive rights growing out of this adoption and use of the said tag or plate and marks thereon and the said label, and that in this and many other ways as in advertisements and catalogs and the like the defendant has simulated the appearance of your orator's goods, copied its methods of doing business and has unfairly competed with your orator; that the defendant's screens are inferior in quality and workmanship to those of

your orator and the putting out of the same in simulation of your orator's construction and of its marks and indicia has the effect to bring the products of your said orator into disrepute.

11. That the defendant has sold within the Southern District of New York and elsewhere within the United States a large number of said infringing screens, but how many your orator does not know and prays discovery thereof; that it has received therefor large gains and profits, the exact amount of which your orator does not know, but prays an accounting therefor, and has caused and is causing your orator great damage and loss, the exact amount of which your orator can not state but which your orator believes and therefore charges exceeds the sum or value of Five Thousand (\$5,000 00) Dollars.

Forasmuch as your orator can have no adequate relief, except in a Court of Equity, and as said acts and doings and proceedings of the defendant are contrary to equity, your orator prays:

(a) That the said defendant be required by decree of this Honorable Court to account for and pay unto your orator such gains and profits as have accrued or arisen or have been earned or received by the defendant, and all of such gains and profits as would have accrued or arisen unto your orator but for the unlawful acts of this defendant, and all damages your orator has sustained thereby.

(b) That the said defendant may be compelled by the order of this Honorable Court, to deliver up to the judicial custody for destruction, in manner to be provided for in said order, all infringing screens in the possession or under the control of said defendant.

(c) That the said defendant, its associates, attorneys, servants, clerks and workmen may be perpetually restrained and enjoined, by a writ of injunction issuing out of and under the seal of this Honorable Court, from directly or indirectly making or causing to be made, using or causing to be used, selling or causing to be sold, or giving away, or in any manner disposing of any screens embodying or constructed or operated in accordance with the invention or improvement set forth in the Letters-Patent aforesaid.

10 (d) That the defendant, its agents, attorneys, clerks, employes and servants, and all persons acting for it, them or under their instructions or under their control, or deriving their authority from them, may be perpetually enjoined and restrained, by an injunction issuing out of and under the seal of this Honorable Court, from further infringing upon the rights of the complainant herein, by manufacturing and selling, or offering for sale screens which are in appearance the same or substantially the same as to their principal features, as the screens manufactured and sold by the complainant, and from copying or imitating the said screens so manufactured and sold by the complainant, and by selling or attempting to sell screens so copied, or which are in imitation of the screens manufactured by the complainant, and from manufacturing and selling or offering for sale as the screens of the complainant, screens which are not the screens manufactured or sold by the complainant, and from attempting to cause the screens manufactured by the defendant to be mis-

taken in the market as screens of the complainant; and from selling and offering for sale screens so closely resembling in appearance the screens of the complainant as to be calculated to mislead the trade or the public, and from manufacturing and selling, or offering for sale, screens having thereon plates or tags like or similar to those used by your orator as aforesaid or like or similar to those used by the defendant as aforesaid or otherwise proceeding in unfair competition with the screens manufactured and sold by the complainant, and otherwise in every way restraining the fraudulent acts of the defendant, whether the same have taken place or are about to take

11 place; and in every way prohibiting the defendant from doing any act or thing whatsoever to cause any screens manufactured or sold by it, not the manufacture of your orator, to be mistaken in the market, or offered or sold as the screen of your orator, and granting unto your orator whatever injunction relief may be necessary in the premises in every way to prohibit the defendant from selling, or from offering to sell any screens which in appearance shall so closely resemble the screen of your orator as to be calculated to mislead, or which shall be so marked, dressed or represented as to mislead the public or cause confusion in the trade, and generally in every way grant unto your orator the injunctive relief to which in equity on the facts as they so appear your orator may be entitled.

(e) That a preliminary injunction may be issued directed to the said defendant, its agents, attorneys, clerks, employe's and servants, to the same purport and tenor and effect as hereinbefore prayed for with regard to said perpetual injunction.

(f) That said Letters-Patent No. 933,599 may be decreed to be valid, and your orator to be the lawful owner of the same, and the manufacture, use and sale by the defendant to an infringement thereof.

(g) And your orator further prays that the said defendant may be decreed to account unto it for the proceeds of the sale of all such screens so sold by the defendant in infringement of your orator's rights, as hereinbefore complained of, and that the defendant pay unto your orator the amount which upon accounting shall be found to be due your orator, either as profits or damages, or otherwise, due to the fraudulent and unlawful acts of the defendant, and in infringement of the rights of your orator, and of such gains and profits as would have accrued to your orator but for the unlawful doings of the defendant, and all damages your orator
12 has sustained thereby.

(h) That your orator may have such other relief in the premises to which in equity it is entitled, as the same shall appear to by just and equitable, and that it may have such relief the same as if it were here now made the subject of a special prayer.

(i) That the defendant may be decreed to pay the costs and charges of this suit.

To the end, therefore, that the defendant may, if it can, show why your orator should not have the relief prayed for, and may full, true and direct answer make, (but not under oath, answer under oath

being expressly waived), according to the best and utmost of its knowledge, information, remembrance and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were repeated paragraph by paragraph, and the said defendant thereto specifically interrogated, may it please Your Honors to grant a writ of subpoena ad responde-dum, issuing out of and under the seal of this Honorable Court, directed to said defendant, The Ludlow-Saylor Wire Company, commanding it to appear and make answer to this bill of Complaint, and to perform and abide by such order and decree as to this Court may seem just.

And your orator will ever pray.

THE W. S. TYLER COMPANY,
PROCTOR PATTERSON,
Vice-Pres't.

D. ANTHONY USINA,

Solicitor for the Complainant,
71 Broadway, New York, N. Y.

FRANK H. GINN,

C. C. LINTHICUM,

JAMES NEGLEY COOKE,

Of Counsel.

13 STATE OF OHIO,
County of Cuyahoga, ss:

Proctor Patterson, being duly sworn, deposes and says that he is the Vice-President of the Corporation named in the foregoing bill; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true; that the reason why this verification is not made by the Complainant is that the Complainant is a corporation.

PROCTOR PATTERSON.

Sworn to and subscribed before me this 11th day of March, A. D., 1912.

EARL P. DISBRO,
Notary Public.

My commission expires Oct. 16, 1914.

Plea to Charge of Infringement of Patent.

In the District Court of the United States in and for the Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
v.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The Plea of the Defendant, Ludlow-Saylor Wire Company, to the Bill of Complaint.

14 And now comes the defendant, the Ludlow-Saylor Wire Company, and specially appearing under protest for the purpose of this plea, and for no other purpose, and not confessing any of the matters contained in the bill of complaint to be true in manner and form as the same are therein set forth and alleged, for plea to so much and such part of the said bill of complaint as charges the defendant with infringement of Letters Patent of the United States of America, number 933,599, for Woven Wire Fabric for Screens, pleads thereto and says:

That at the time of bringing this suit, the complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a resident and inhabitant of the Eastern Division of the Northern District of Ohio, and a citizen of the State of Ohio; and that at the commencement of this suit, the defendant was not and is not now a resident or an inhabitant of the Southern District of New York, where this suit is brought, or a citizen of New York, but says that at the commencement of this suit it was and is a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, and was and is an inhabitant of and residing in and that it now resides in the Eastern Division of the Eastern District of the State of Missouri, and not in the Southern District of New York, where this suit is brought.

That by its bill filed in this cause, the complainant in this cause, amongst other things charges the defendant with infringement of said Letters Patent of the United States No. 933,599 for wire screens and alleges for the purpose of showing jurisdiction in this

15 Court, that the said defendant, the Ludlow-Saylor Wire Company has a regular and established office and place of business at No. 30 Church Street, Borough of Manhattan, City of New York, in the Southern District of New York, and that some of the acts of alleged infringement complained of in said bill were committed in said Southern District of New York.

Defendant says it is not true that the defendant has a regular and established office and place of business at No. 30 Church Street, Borough of Manhattan, City of New York, in the Southern District of

New York, as alleged in the bill of complaint or at any other place in the said Southern District of New York.

And it is not true that any of the alleged acts of alleged infringement by defendant complained of in said bill were committed in the said Southern District of New York.

Defendant states the truth and the fact to be that at and before the filing of said bill it had and still has a business arrangement with one B. C. Guerin, to solicit orders within the States of Pennsylvania and New Jersey, and within the Southern District of New York, for the goods which defendant manufactures at the City of St. Louis and State of Missouri.

That said B. C. Guerin was not and is not an officer of the defendant, nor has he at any time had nor has he now any authority to represent the defendant in any manner or to any extent or for any purpose except to solicit and take orders for its said goods, subject to its acceptance or rejection, and transmit the same to the defendant at its place of business in the City of St. Louis and State of Missouri; and defendant says it is informed and believes, and therefore states

16 the fact to be that the acts of said Guerin on its behalf have at all times been limited to the soliciting and taking of such orders, and that the said Guerin has not at any time represented or assumed to represent the defendant otherwise than as above stated.

That defendant had not at or before the filing of the bill herein and has not since had and has not now, any officer or agent or employee of any character or description representing it in any way or at any place within said Southern District of New York, other than said B. C. Guerin.

That at said times said Guerin also represented and still represents the Hendrick Manufacturing Company, manufacturing of perforated metals and general sheet iron work, whose home office and place of business was and is at the City of Carbondale, Pennsylvania, under some arrangement, the particulars of which are unknown to the defendant. That the said B. C. Guerin at and before the filing of this suit, occupied and now occupies an office in the office building No. 30 Church Street, in the City of New York, and Southern District of New York, the rental of which office and the wages of the stenographer employed by said B. C. Guerin in said office were and are paid jointly by the said Hendrick Manufacturing Company and the defendant.

That at and before the filing of this suit, there appeared and still appears upon the door of said office in said office building No. 30 Church Street, the following:

"1028" (Being number of the room.)

"Hendrick Manufacturing Company. Perforated Metals, General Sheet Iron Work. Home Office Carbondale, Pennsylvania.

17 The Ludlow-Saylor Wire Company. Home Office, St. Louis, Missouri. Manufactures of the 'Perfect' Double Crimped Wire Cloth and Mining Screen.

B. C. GUERIN."

That said office has not at any time been and is not now for the use of defendant and has not any time been and is not now used by defendant, but at all times has been and still is, solely for the use of and has been and still is used by the said Guerin solely for the transaction of his own business in connection with the said Hendrick Manufacturing Company, and his own business in connection with the defendant, as herein particularly set forth, and such other of his affairs as he has chosen or may choose to transact therein, but not for the business of the defendant in any sense other than in such limited and qualified sense as may appear from the facts herein stated.

That defendant has at no time had and now has no other connection with the said office than the joint payment of the rental therefor with the said Hendrick Manufacturing Company, which rental it pays as part of its compensation to said Guerin.

That in addition to the joint payment of the rental of said office and the wages of said stenographer as aforesaid, the defendant has paid the said Guerin as compensation for his services to it, a nominal monthly salary and commission on such orders sent it by him, as have been accepted by the defendant.

And defendant says on information and belief the said office at said office building No. 30 Church Street is the place referred to by the complainant in its bill and alleged therein to be a regular and established office of the defendant.

That said Guerin has not at any time had, nor has he now, any power or authority to make any outright sales of defendant's goods, for or on behalf of the defendant, but his authority has been and is limited to the soliciting and taking of orders for the defendant's goods as hereinbefore set forth.

And defendant avers the fact to be that the said Guerin has not at any time made any outright sales of defendant's goods, for or on behalf of the defendant, within said Southern District of New York, or elsewhere, but has at all times kept within the said limitation of his authority.

That all such orders taken by the said Guerin within said Southern District of New York, or elsewhere, for delivery, if accepted, within said Southern District of New York or elsewhere, have been transmitted by the said Guerin to the defendant, at its office and place of business in the City of St. Louis, Missouri, where such orders have been either accepted or rejected by the defendant. That all such orders sent in by said Guerin, which have been accepted by the defendant have been filled from said City of St. Louis, Missouri, and have been there delivered to the common carrier for transmission to the purchaser and have been billed by the defendant to the purchaser from there.

That the defendant had not at any time at or before the filing of this suit had any goods in the Southern District of New York, out of which orders could be or have been filled, nor has it had at any time since, nor has it now any goods within said Southern District of New York out of which orders have been or could be or can be filled.

That defendant has never at any time either before or since the filing of the bill in this cause, kept any books of account within said

Southern District of New York, nor does it now keep any such books therein, but all its books of account are and at all times have
19 been kept at its office and place of business in said City of St. Louis. That said Guerin has not at any time been authorized, nor is he now authorized to collect money on any orders taken by him, and accepted and filled by the defendant. But that all payments for goods on orders taken by said Guerin and accepted by the defendant, have been sent to the defendant at its said office and place of business in the said City of St. Louis, directly by the purchasers of goods.

Defendant further says that its factory in which it manufactures all its goods, is located in the City of St. Louis, Missouri, and that the wire screens which the complainant by its bill alleges to be infringements of its alleged patent, are all manufactured at the said City of St. Louis, Missouri.

And defendant says that it has not at any time manufactured, sold or used within the Southern District of New York, any of the alleged infringing wire screens.

Wherefore, defendant says that complainant is not entitled to have or maintain this action against it, based upon charges of infringement of said United States Patent, and this Court is without jurisdiction to entertain such action, because it says that the said District Court of the United States for the Eastern Division of the Eastern District of Missouri has jurisdiction of the controversy between the complainant and the defendant based on such charges of infringement of said patent as set forth in said bill and not this Court.

All of which matters and things this defendant avers to be true, and pleads the same in abatement to so much and such part of complainant's bill as charges the defendant with the infringement of said patent, and prays the judgment of the Court whether it
20 shall be compelled to further answer said bill and prays to be hence dismissed with its costs.

THE LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Solicitor*.

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

I, Augustus N. Hand, Solicitor for the defendant in the above entitled cause, do hereby certify that the above plea is well founded in law.

AUGUSTUS N. HAND.

JAS. P. DAUSON,
WM. E. GARVIN,
Of Counsel.

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern
 District of Missouri, ss:*

Frank Low, being duly sworn on his oath says that he is the Vice-President of the Ludlow-Saylor Wire Company, defendant in the above entitled cause; that he has read the foregoing plea and knows the contents thereof. And that the same is true in point of fact and is not interposed for the purpose of delay. That the reason why this verification is not made by the said defendant, is that the defendant is a corporation and can only speak by its officers.

FRANK LOW.

Sworn to and subscribed before me this 23th day of April, A. D., 1912.

[SEAL.]

W. W. NALL,
*Clerk of the United State- District Court
 in and for the Eastern Division of the
 Eastern Judicial District of Mo.*

21 *Plea to Charge of Unfair Competition.*

In the District Court of the United States in and for the Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
 vs.
 THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The Plea of the Ludlow-Saylor Wire Company, Defendant, to the Bill of Complaint.

And now comes the defendant, the Ludlow-Saylor Wire Company, and specially appearing under protest, for the purpose of this plea, and for no other purpose, and not confessing any of the matters contained in the bill of complaint to be true, in manner and form as the same are therein set forth and alleged, for plea to so much and such part of said bill as alleges unfair competition in trade by the defendant, and prays relief as against and on account of such alleged unfair competition, pleads thereto and says:

That at the time of bringing this suit, the complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a resident and inhabitant of the Eastern Division of the Northern District of Ohio, and a citizen of said State of Ohio, and was not at said time and is not now, a resident or inhabitant of the Southern District of New York, where this suit is brought or a citizen of said State of New York; that at the commencement of this suit the defendant was not and is not now a resident or an inhabitant of the

Southern District of New York where this suit is brought, or a citizen of New York, but says that at and before the commencement of this suit, it was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, and was at said time an inhabitant of and residing and is now an inhabitant of and residing in the Eastern Division of the Eastern District of the State of Missouri, and not in the Southern District of New York, where this suit is brought.

That by its bill filed in this cause, the complainant in this cause, amongst other things charges the defendant with unfair competition in trade and seeks relief against the defendant based on such charges of unfair competition.

But defendant shows to the Court that in such action between the parties to this suit there is no ground of Federal jurisdiction other than that the complainant and defendant are citizens, residents and inhabitants of different States, and that the defendant can not be sued without its consent in any Federal Court other than in the District where either the plaintiff or the defendant resides.

Wherefore defendant says that complainant is not entitled to have or maintain this action against it based upon charges of unfair competition in this District or in this Court, and this Court is without jurisdiction against the objection of the defendant to entertain such action.

And defendant pleads its privilege to be sued in the Eastern Division of the Eastern District of Missouri, whereof it is an
23 inhabitant and resident or in the Eastern Division of the Northern District of Ohio, whereof the complainant is a resident and inhabitant, and insists upon its exemption from suit on such charges in this Court, because it says that the said District Court of the United States for the Eastern Division of the Northern District of Ohio and the District Court of the United States for the Eastern Division of the Eastern District of Missouri, have jurisdiction of the controversy between the complainant and the defendant, based on such charges of unfair competition as set forth in said bill and not this Court.

All of which matters and things this defendant avers to be true and pleads the same in abatement to so much and such part of complainant's bill as charges defendant with unfair competition in trade, and prays the judgment of the Court whether it shall be compelled to further answer said bill and prays to be hence dismissed with its costs.

THE LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Solicitor*.

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

I, Augustus N. Hand, Solicitor for the defendant in the above entitled cause, do hereby certify that the above plea is well founded in law.

AUGUSTUS N. HAND,
Solicitor for Defendant.

JAS. P. DAUSON,
WM. E. GARVIN,
Of Counsel.

24 UNITED STATES OF AMERICA,
*Eastern Division of the Eastern
District of Missouri, ss:*

Frank Low, being duly sworn on his oath says that he is the vice-president of the Ludlow-Saylor Wire Company, defendant in the above entitled cause; that he has read the foregoing plea and knows the contents thereof, and that the same is true in point of fact, and is not interposed for the purpose of delay.

That the reason why this verification is not made by the said defendant is that the defendant is a corporation and can only speak by its officers.

FRANK LOW.

Sworn to and subscribed before me this 26 day of April, A. D. 1912.

[SEAL.]

W. W. NALL,
*Clerk of the United States District Court in and for
the Eastern Division of the Eastern Judicial Dis-
trict of Missouri.*

Plea to Charge of Infringement of Trade-Mark.

In the District Court of the United States in and for the Southern
District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The Plea of the Ludlow-Saylor Wire Company, Defendant, to the
Bill of Complaint.

25 And now comes the defendant, the Ludlow-Saylor Wire Company, and specially appearing under protest, for the purpose of this plea, and for no other purpose, and not confessing any of the matters contained in the bill of complaint to be true, in manner and form as the same are therein set forth and alleged, for plea to so much and such part of said bill as alleges infringement by defendant of an alleged trade-mark (not therein alleged to be

registered in the Patent Office of the United States) and prays relief as against and on account of such alleged infringement of such alleged trade-mark, pleads thereto and says:

That at the time of bringing of this suit, the complainant was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a resident and inhabitant of the Eastern Division of the Northern District of Ohio, and a citizen of said State of Ohio, and was not at said time and is not now, a resident or inhabitant of the Southern District of New York, where this suit is brought, or a citizen of said State of New York; that at the commencement of this suit the defendant was not and is not now a resident or an inhabitant of the Southern District of New York where this suit is brought, or a citizen of New York but says that at and before the commencement of this suit, it was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State of Missouri, and was at said time an inhabitant of and residing — and is now an inhabitant of and residing in the Eastern Division of the Eastern District of the State of Missouri, and not in the Southern District of New York, where this suit is brought.

26 That by its bill filed in this cause, the complainant in this cause, amongst other things charges the defendant with infringement of a trade-mark (not therein alleged to be registered in the Patent Office of the United States), and seeks relief against defendant based on said charge of infringement of said alleged trade-mark.

But defendant shows to the Court that in such action between the parties to this suit there is no ground of Federal jurisdiction other than that the complainant and defendant are citizens, residents and inhabitants of different States, and that the defendant can not be sued without its consent in any Federal Court other than in the District where either the plaintiff or the defendant reside.

Wherefore defendant says that complainant is not entitled to have or maintain this action against it based upon charges of infringement of a trade-mark, in this District or in this Court, and this Court is without jurisdiction against the objection of the defendant, to entertain such action.

And defendant pleads its privilege to be sued in the Eastern Division of the Eastern District of Missouri, whereof it is an inhabitant and resident or in the Eastern Division of the Northern District of Ohio, whereof the complainant is a resident and inhabitant, and insists upon its exemption from suit on such charges in this Court, because it says that the said District Court of the United States for the Eastern Division of the Northern District of Ohio and the District Court of the United States for the Eastern Division of the Eastern District of Missouri have jurisdiction of the controversy between the complainant and the defendant, based on such charges of

27 infringement of an unregistered trade-mark, as set forth in said bill, and not this Court.

All of which matters and things this defendant avers to be true and pleads the same in abatement to so much and such part of complainant's bill as charges the defendant with infringement of such

alleged trade-mark, and prays the judgment of the Court whether it shall be compelled to further answer said bill and prays to be hence dismissed with its costs.

THE LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Solicitor*.

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

I, Augustus N. Hand, solicitor for the defendant in the above entitled cause, do hereby certify that the above plea is well founded in law.

AUGUSTUS N. HAND, *Solicitor*.

JAS. P. DAWSON,
WM. E. GARVIN,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern District of Missouri, ss:

Frank Low, being duly sworn on his oath says, that he is the Vice-President of the Ludlow-Saylor Wire Company, defendant in the above entitled cause; that he has read the foregoing and knows the contents thereof, and that the same is true in point of fact, and is not interposed for the purpose of delay.

28 That the reason why this verification is not made by the said defendant is that the defendant is a corporation and can only speak by its officers.

FRANK LOW.

Sworn to and subscribed before this 26th day of April, A. D. 1912.

[SEAL.]

W. W. NALL,
Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Mo.

Notice of Motion.

In the District Court of the United States, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

To the clerk of the District Court of the United States, Southern District of New York, at the City of New York:

Please enter the Special appearance of the defendant in the above entitled Cause and the Special appearance of ourselves as its Solicitor.

itors for the sole purpose of objecting to the jurisdiction of this Court to compel the defendant to appear and answer in said Cause:

29 Because the return of the United States Marshal upon the Subpoena issued in this Cause does not show that said subpoena was exhibited to the defendant or to any officer or agent of the defendant or that any copy thereof was left with the defendant or any officer or agent of the defendant.

Because said return does not show that the person to whom the said Marshal states he exhibited said Subpoena and with whom he states he left a copy thereof was any officer or agent of the defendant, or that such person was engaged in conducting business of the defendant at any regular or established place of business of the defendant within the Southern District of New York.

Because the complainant by its bill filed in this Cause charges the defendant with unfair competition and with infringement of an alleged patent. But the defendant says it is not an inhabitant of this district or citizen of this State but is a corporation organized under the laws of the State of Missouri and a citizen and inhabitant of said State and that complainant is not entitled to have or maintain any action based upon a charge of unfair competition in this district or in this Court, and that this Court is without jurisdiction to entertain such action.

Because the defendant says that complainant is not entitled to maintain any action against it based on a charge of infringement of a patent in this district or in this Court because the defendant is not an inhabitant of this district and has no regular or established place of business in this district and this Court is without jurisdiction to entertain such action.

30 All of which objections the defendant will bring before the Court by appropriate motions and pleas.

Dated, April 1st, 1912.

LUDLOW-SAYLOR WIRE CO.,
By AUGUSTUS N. HAND, *Its Solicitor.*

49 Wall Street, Borough of Manhattan, New York City.

Order Allowing Filing of Defendant's Pleas.

At a Stated Term of the United States District Court, Held in and for the Southern District of New York, at the Post-Office Building in New York County, on the 6th Day of May, 1912.

Present: Hon. George C. Holt, U. S. Judge.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Plaintiff,
against

THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

On reading the Bill of Complaint in the above entitled suit on file in the Office of the Clerk of this Court, and the special appearance

of the defendant herein by Augustus N. Hand, *his* Solicitor,
31 for the sole purpose of objecting to the jurisdiction of this
Court to compel the defendant to appear and answer in said
cause, and on reading

(1) The Plea of the defendant herein to so much and such part
of the said Bill of Complaint as charges the defendant with infringement
of Letters Patent of the United States of America No. 956,599
for woven wire fabric for screens; and

(2) The Plea of the defendant to so much and such part of said
Bill of Complaint as alleges infringement by defendant of an alleged
trade-mark; and

(3) The Plea of the defendant to so much and such part of said
Bill of Complaint as alleges unfair competition in trade by the de-
fendant.

And after hearing Augustus N. Hand, solicitor for the defendant,
who has appeared in this case for the sole purpose of objecting to the
jurisdiction of this Court to compel the defendant to appear and
answer in said cause;

Now on motion of Augustus N. Hand, solicitor for said defendant,
it is

Ordered, that the above named Ludlow-Saylor Wire Company be
and it hereby is authorized and allowed to file the said three separate
Pleas, and each of them, in the Office of the Clerk of this Court.

GEO. C. HOLT.

32

Replication to Pleas of Defendant.

United States District Court, Southern District of New York.

9-101. In Equity.

THE W. S. TYLER COMPANY

VS.

THE LUDLOW-SAYLOR WIRE COMPANY.

This replicant, W. S. Tyler Company, saving and reserving to
itself all and all manner of advantages of exception which may be
had and taken to the manifold errors, uncertainties and insuffi-
ciencies of the pleas of the defendant, Ludlow-Saylor Wire Com-
pany, for replication thereunto, saith that it doth and will aver, main-
tain and prove its said bill to be true, certain and sufficient in the
law to answer unto by the said defendant. And that the plea of the
said defendant is very uncertain, evasive and insufficient in law to
be inquired into by this replicant; without that, that any other
matter or thing in the said plea contained, material or effectual in
the law to be replied unto, and not herein and hereby well and suf-
ficiently replied unto, confessed or avoided, traversed or denied, is
true; all which matters and things this replicant is ready to aver,
maintain and prove as this Honorable Court shall direct and humbly
prays as — and by its said bill it hath already prayed.

New York, July 15, 1912.

D. ANTHONY USINA,
Solicitor for Complainant.

Filed, July 16, 1912.

33

Notice of Motion.

In the District Court of the United States, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,

vs.

THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

SIR: Please Take Notice that upon the Bill of Complaint in this cause, the Præcipe, the Writ of Subpœna herein, and the Return of the Marshal upon said Writ, said Return bearing date March 13th, 1912, and filed on said date in the Office of the Clerk of the United States District Court for the Southern District of New York, all said papers being on file in the Office of said Clerk, a motion will be made at a Term of the United States District Court, Southern District of New York, to be held in the Post Office Building in the Borough of Manhattan, City of New York, on the 24th day of May, 1912, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order quashing the Return of the Marshal, to the Writ of Subpœna addressed to the defendant issued in said cause

(1) Because said return of the United States Marshal upon the said subpœna does not show that said subpœna was exhibited to the defendant or to any officer or agent of the defendant, or that any copy thereof was left with the defendant or any officer or agent of the defendant.

(2) Because said return does not show that the person to whom the said marshal states in said return he exhibited said subpœna, and with whom he states in said return he left a copy thereof was any officer or agent of the defendant, or that such person was engaged in conducting business of the defendant, at any regular or established place of business of the defendant, within the Southern District of New York.

And vacating and holding the said return for naught, and adjudging that the defendant shall not be compelled to appear or answer herein, and dismissing the Bill of Complaint on the ground that the Court has obtained no jurisdiction of the defendant herein, and for such other and further relief as to the Court may seem just.

Dated. New York, May 6th, 1912.

Yours, &c.,

AUGUSTUS N. HAND,

Solicitor for Defendant, Appearing Specially for the Reason of Objecting to the Jurisdiction of This Court to Compel the Defendant to Appear and Answer in This Cause.

Office & Post Office Address, No. 49 Wall Street, Borough of Manhattan, New York City.

To D. Anthony Usina, Esq., Solicitor for Complainant, No. 71 Broadway, Borough of Manhattan, New York City.

35 *Stipulation Extending Time for Hearing of Motion.*

In the District Court of the United States, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

It is Stipulated and Agreed between solicitors for the respective parties that defendant's motion for an order quashing the return of the marshal which is now set for hearing on the 24th inst. be continued over to Friday the 31st instant.

Dated, New York, May 21st, 1912.

D. ANTHONY USINA,
Solicitor for Complainant.
AUGUSTUS N. HAND,
*Solicitor for Defendant, Appearing Specially as per
Appearance Filed in This Suit.*

Filed, Aug. 7, 1912.

36 *Order as to Sustaining Defendant's Pleas.*

At a Stated Term of the United States District Court, Held at the United States Post-Office Building on the — Day of October, 1912.

Present: E. Henry Lacombe, U. S. Circuit Judge.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Plaintiff,
against
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

The argument upon the several pleas of the defendant in this cause heretofore noticed for Argument at a term of this court, held on the 7th day of June, 1912, and thereafter duly adjourned to a term of this court, held on the 14th day of June, 1912, having regularly come on to be heard upon the said last named day upon the bill of complaint and the three separate pleas of the defendant thereto;

And after hearing James P. Dawson of Counsel for the defendant in support of said Pleas, and D. Anthony Usina of Counsel for the Complainant in opposition thereto.

Now on motion of Augustus N. Hand, Solicitor for the defendant herein (appearing specially for the purpose of objecting to the juris-

diction of this Court in accordance with the three separate Pleas heretofore interposed and filed by said defendant), it is

37 Ordered, Adjudged and Decreed that the three separate Pleas of the defendant to the Complaint herein be and the same hereby each are sustained and it is hereby further

Ordered: That so much of the bill as charges infringement of un-registered trade-mark and unfair competition is dismissed on the ground that this Court has no jurisdiction of these two controversies, and it is further

Ordered: That the complainant be allowed to file a replication and join issue upon the Plea to that portion of the Bill of Complaint relating to an alleged infringement of Letters Patent and not to the other Pleas, to the portions of the Bill of Complaint alleging infringement of an unregistered trade-mark and unfair competition.

New York, October 4, 1912.

(S'gn'd)

E. HENRY LACOMBE,
U. S. C. J.

Replication to Plea on Patent Infringement.

In the United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY

vs.

THE LUDLOW-SAYLOR WIRE COMPANY.

38 This Replicant, W. S. Tyler Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the plea of the Defendant, Ludlow-Saylor Wire Company, to such part of the bill of complaint as charges the Defendant with infringement of Letters Patent, for replication thereunto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to answer unto by the said Defendant, and that the plea of the said Defendant is very uncertain, evasive and insufficient in law to be inquired into by this Replicant; without that, that any other matter or thing in the said plea contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this Replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as and by its said bill it hath already prayed.

New York, October 5, 1912.

D. ANTHONY USINA,
Solicitor for Complainant.

Guerin Deposition.

BRYAN C. GUERIN, a witness called on behalf of complainant, being duly sworn, testified as follows:

I am 37 years old, reside in Orange, New Jersey and am at present the representative of the Hendrick Manufacturing Company of Carbondale, Pennsylvania.

39 From January, 1911, to July, 1912, I was the eastern representative of Ludlow-Saylor Wire Company, the defendant in this case. I sold wire cloth manufactured by them and received payment in the form of a salary and commission, traveling expenses were also paid. I solicited orders for the same, which orders were usually addressed to Ludlow-Saylor Wire Co., 30 Church Street, New York; some times the additional address was given of B. C. Guerin, Agent. A portion of the entrance door of my office was inscribed with the name of The Ludlow-Saylor Wire Company. My name also appeared on the door without designation. In some cases when I received an order for Ludlow-Saylor Wire Company copies of the original order were mailed to the Company at St. Louis and I retained the original. In other cases a copy of the original order, together with the original received, were mailed to the company at St. Louis. Relative to filing the actual orders received would state that I had no part in this operation. It was my duty to solicit orders, forward them when received to the home office for execution. The orders were paid for by those making the purchase. In some cases the remittance was sent direct to the Ludlow-Saylor Wire Company at St. Louis; in other cases the payment was made through me. When the payment was made through me I received the check and in turn sent it forward to the company at St. Louis. The check was never drawn to me personally. I always acknowledged the receipt of funds in the form of a letter to customers, actual receipts were sent from the home office. There may be one exception to this usual method. I would not care to swear that I did not give a receipt in this instance, although it is my impression that the same course was followed as in previous instances. This exception was a transaction which transpired in Brooklyn. It was claimed by our customer that the material shipped was not as order specified. It was therefore necessary to make an adjustment in the settlement of the account. It was left in my hands to adjust the matter to the best advantage of the Ludlow-Saylor Wire Company, which I did, and which settlement was accepted by them. The customer in this case was George Kneuper, Brooklyn, New York. I can not give the street address; his name is in the telephone book. All letters which I wrote were signed "Ludlow-Saylor Wire Company, B. C. Guerin, Eastern Representative."

40 All the time that I was in the employ of the Ludlow-Saylor Wire Company I received a salary and they paid a portion of the rent of my office. For a certain period they paid twenty-five (\$25) dollars a month and I think afterwards it was reduced to twelve dollars and fifty cents (\$12.50) a month. The lease of the office was in the name of the Hendrick Manufacturing Company. The Ludlow-

Saylor Wire Company were sub-tenants of the Hendrick Manufacturing Company under an agreement in writing of which I have no copy and which I have not seen. I sent it to our home office. (I say our home office, I mean the office of the Hendrick Manufacturing Company) at the time the Ludlow-Saylor Wire Company appointed me their eastern representative, a recommendation that some form of an agreement should be drawn up between the Ludlow-Saylor Wire Company and themselves as to the payment of the portion of the rent and stenographer's services, direct to the Hendrick Manufacturing Company by Ludlow-Saylor Wire Company.

41 I received a reply to this communication in writing from our home office that such an agreement had been satisfactorily closed. I couldn't say whether I have this reply in my office or not, I could get a copy.

Objected to so much of the witness' answer as purports to be the contents of the written reply which he says he received.

I will make an effort to secure this original reply.

I came here to testify under a subpoena. I had a written contract with the Ludlow-Saylor Wire Company.

(The witness produced a number of letters relating to his contract of employment by the Ludlow-Saylor Wire Company of which the following were copied into the record.)

Of the papers produced by the witness counsel for complainant offers the following in evidence and they are here copied into the record:

The Ludlow-Saylor Wire Company,

Manufacturers of "The Perfect" Double Crimped Wire Cloth and Mining Screen, Poultry and Farm Fences, Window Screen Cloth and "Hex" Nettings.

"The Perfect" Trade Mark Co.

W.

Double Crimped.

NEWSTEAD AVE. AND WABASH TRACKS,
ST. LOUIS, Dec. 29, 1910.

42 Mr. B. C. Guerin, 30 Church St., New York.

DEAR SIR: Referring to conversation had with you when in New York, beg to advise that we shall be glad to arrange with you to represent our Company on the following basis:

We to assume one-half the salary of the stenographer, which we understand to be \$70.00 per month, which would mean \$35.00 per month which we would assume. Also one-half office rent, which you state is \$40.00 per month. We would assume \$20.00 of this amount, making a total of \$55.00 per month for office rent and stenographer. We also to pay you a salary of \$50.00 per month and allow you a commission of 5% on your sales. We feel as though

the commission of 5% should be based on a certain amount of sales, and we would be willing to have the arrangement covering 5% on all sales of \$3,000.00 or over for six months. No commission to be paid on less than this amount. I say six months because I think it would be better to make the arrangement covering a period of six months, and at the end of that time we will take the matter up again and we can then arrive at some conclusion as to what further arrangements should be made that would be equitable to both. You can readily understand that on sales of less than this amount it would not be profitable to you nor to us, and I feel quite sure that you can make a very much better showing than that.

If you have any further suggestions to make along this line, let us have them and upon receipt of your reply we will have a contract drawn up and sent on to you, so we can get the thing fixed up by the first of January.

43 With kind personal regards and wishing you the compliments of the season, I beg to remain,

Yours very truly,

FRANK LOW, V. P.

F. L.-C.

#30 CHURCH ST., N. Y.,

Dec. 31st, 1910.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: Yours of the 29th received. The suggestions you offer in contract to be made appeals to me. I am submitting this to Mr. Bassett of our company for his O. K., which I feel sure it will receive.

Yours very truly,

JAN. 4, 1911.

Mr. Frank Low, c/o Ludlow-Saylor Wire Co., St. Louis, Mo.

DEAR MR. LOW: Referring to your communication of Dec. 29th, beg to advise that I have to-day received Mr. Basset's formal acceptance of the terms outlined by you in communication referred to.

I have not had time to go into detail with Mr. Bassett as he has been exceedingly busy in this city to-day but will write you further to-morrow, as to the method they suggest as to the handling of details.

44 I do not know whether you have given the matter of stationery, to be used by me, any thought, or whether it is your intention to have me use plain paper in my correspondence.

Please advise.

Yours very truly,

NEW YORK OFFICE, *Jan. 25, 1911.*

Attention Mr. Low.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: I beg to acknowledge receipt of yours of Jan. 23rd and contents carefully noted. I return, herewith, one copy of agreement which I have executed and which is for your files.

I would suggest in connection with the first paragraph of this contract that you take up the items contained therein with the Hendrick Mfg. Company, confirming the arrangement as outlined. These items are not subject to my control and should be confirmed with my principals.

I am very glad we have eventually gotten this matter in a form acceptable to all concerned, and trust that none of the interested parties may ever regret having made this arrangement.

Yours very truly, ———.

WITNESS (continues): The "Frank Low, Vice-President" who signed the above letter dated December 29, 1910, is vice-president of the Ludlow-Saylor Wire Company. This letter was received by me December 31, 1910, and I answered it on the same day. The above letter dated December 31, 1910, was signed by me and sent to the Ludlow-Saylor Wire Company. The same is true of the above letters dated January 4 and January 25, 1911.

It is stipulated between counsel that the foregoing letters of December 29, 1910, December 31, 1910, January 4, 1911, and January 25, 1911, may be put on the record with the same force and effect as proved originals, subject to timely objection and correction.

Of the papers produced by the witness counsel for complainant offers in evidence the following and it is hereby stipulated that they may be received with the same force and effect as proved originals, subject to timely objection and correction.

The Ludlow-Saylor Wire Company.

Rek-Tang Rolled Slot Screen.

Square Mesh Double Crimped Wire Cloth.

ST. LOUIS, *July 27, 1912.*

Mr. B. C. Guerin, New York City.

DEAR SIR: We enclose herewith memorandum of sales covering your orders for the six months ending July 1st, 1912. You will notice the total amount of these orders was \$3,569.38, less credits for freight etc. \$69.63 leaving \$3,499.75. You will also note we have deducted error in our statement of January 1st. At this time we allowed commissions on estimated amount of \$2,088.68 while the actual amount was \$2,022.90 or a difference of \$35.78, which we

have deducted from the above, making net amount \$3,-
 46 433.97. Commission of 5% amounting to \$171.70. Stamps
 \$5.95, entertaining customers as per your letter of the 15th
 inst. \$50.00, making total amount of \$227.65. From this we have
 deducted balance on hand from expense money for Pennsylvania
 trip \$16.40.

We enclose herewith our check for \$211.25 covering all commis-
 sions to which you are entitled on sales from January 1st to July
 1st, 1912. We trust you will find this correct.

We also would ask you to advise relative to returning all papers,
 price lists, sample board, etc., which were our property. Some
 weeks ago you advised that you were packing these things up but
 up to the present time we have not received any word from you
 advising of shipment.

With kind regards, beg to remain,

Yours very truly,

THE LUDLOW-SAYLOR WIRE CO.
 FRANK LOW, V. P.

F. L.-C.

(In pencil:) #44,296. May 29, 1912.

The Ludlow-Saylor Wire Company,

Rek-Tang Rolled Slot Screen.

Square Mesh Double Crimped Wire Cloth.

ST. LOUIS, May 29, 1912.

Mr. B. C. Guerin, New York City.

MY DEAR MR. GUERIN: I have gone over very thoroughly, the
 records of the result of our New York Office during the past
 47 year and nearly a half, and our Company do not feel that we
 are warranted in continuing this arrangement. I am writing
 you to-day to advise that we feel that it is to our interest to close this
 Office the first of July as the result has been anything but satis-
 factory to our Company. In fact, the amount of business which we
 have done through the New York Office in comparison with the
 expense of doing it, has shown us a loss. Personally, the writer has
 felt that a connection in New York would be advantage-ous to us, but
 from my observation and the results shown in the past year or more,
 I am of the opinion that there is nothing in it as far as profits are
 concerned.

I regret having to write you in this way. I feel sure that you
 have done all that would be done in that territory, but the great
 bulk of our business is done in the Western territory. I therefore,
 wish to advise you that we do not care to renew our contract with
 you the first of July.

I enclose herewith check for Eighty Dollars (\$80.00) covering
 salary for May, 1912.

Will you kindly arrange to have sample board and such literature
 as you have of ours, shipped back to us prior to July 1st. You under-

stand of course, that we will assume the office charge and your salary up to July 1st. Also allow you such commissions as is due you, up to that time.

I wish to say to you that I have nothing but the very kindest feelings towards you, and I know that you have done all that could be done in that territory, but I must frankly confess that I do not believe that we can profitably maintain an office in New York. You of course, are as well informed as to the amount of your sales as we are, and the result is not at all satisfactory.

With kind personal regards, I beg to remain,

Yours very truly,

FRANK LOW, *V. P.*

F. L.-C.

48

The Ludlow-Saylor Wire Company.

Rek-Tang Rolled Slot Screen.

Square Mesh Double Crimped Wire Cloth.

ST. LOUIS, *January 18, 1912.*

Mr. B. C. Guerin, 30 Church St., New York.

MY DEAR MR. GUERIN: I have your favor of the 16th and fully note contents. I note all you say in this letter and recognize the fact that during the months of November and December you were unable to give any attention to the business. As I wrote you, it seems to me that the only way we can get better results is to outline a vigorous campaign of personal solicitation, particularly covering the cement plant- and other industrial institutions that use wire cloth. These different people who use these goods have got to be hunted out. I know that you feel just as we do—that what we want is results. We want just as much business as we can get in that territory, and we want to help you all we can to get it. It would seem to me that the New York territory, certainly ought to be worked up to \$25,000 or \$30,000, a year, and this I would think a small amount of business for that territory. I believe the only way it can be done is personal solicitation, and you understand of course, as well as I do that this means more or less traveling, and probably a considerable amount of traveling.

There are a number of different purchasing men in New York who buy our goods, but they have got to be dug out and called upon.

I don't know whether there is any regular agency there that
49 can give you this information, but possibly there is. I wrote to Honolulu the other day and have a reply from Alexander & Baldwin who refer us to their New York Office, 82 Wall Street. I sent this letter to you and I want you to call on them and see what they have to say. This is only one instance and I presume there are a great many different concerns who purchase our goods right in the New York Market. The Ingersoll-Rand Co., parties whom I called upon the last time I was in New York, sent us an order for 50 pieces of Rek-tang. This was to take the place of their order for Ton-Cap, and went to South Africa.

I simply call your attention to this to show you that there are a great many industries in New York City proper that should be looked after and gotten next to.

I note what you say about the Knickerbocker Portland Cement Co. Mr. Curtis, the Purchasing Agent of this Company is a personal friend of mine and when he went to New York he specially advised me that he would shift the account to us. While I think I told you I wanted you to make a trip up to Hud-on and meet this party, I don't know of any time when you did so. As far as his business is concerned, Mr. Curtis would have sent me his business without any solicitation. It doesn't seem to me that you are entitled to a commission on that account. Aside from this account, I think you have been given credit on all orders that have come in from the Ohio and Pennsylvania territory.

If we continue this arrangement, I shall want to feel that you will be in position to get after the cement business aggressively and make regular trips into that section and try and get results. The 50 small pieces which you send us are not at all attractive to us.

These orders are generally handed to Howard & Morse. We don't care for that class of business, but we do want the business of full rolls or more.

I trust you will be in shape to get back to the office very quickly and watch the accounts as I know you want to. I don't believe I shall go East with Mr. Robertson. In fact, I have no particular desire for him to go East on our account, and if he goes to New York it will be on his own account this Spring.

I hope this will find you in good shape, and with kind personal regards, beg to remain,

Yours very truly,

F. L.-C.

FRANK LOW, V. P.

Memorandum.

CARBONDALE, Pa., 1-18-12.

To New York Office.

Hendrick Manufacturing Co.

Main Office and Works, Carbondale, Pa.

Re Ludlow-Saylor Wire Co.

DEAR GUERIN: Replying to your favor of the 16th:

In view of the condition of their trade last year, we are willing to meet your views as to compensation we are to receive from them for office rent and use of stenographer, and it will, therefore, be acceptable for you to send us \$30.00 per month until further notice.

Yours truly,

HENDRICK MFG. CO.
L. A. BASSETT, *President.*

R. W. W.

51

JAN. 23rd, 1912.

Ludlow-Saylor Wire Co., St. Louis, Mo.

Mr. Low.

GENTLEMEN: Yours of the 18th inst. received and contents fully noted.

The writer fully agrees with you that there is but one way to get business, and that is to "hustle" for it. One must see either the man, who uses the material, the man who purchases the same, or both. This all takes time, and is more or less expensive.

In line with your ideas, and my past experience, the burden of this work falls on me, personally. Not on the office, or its working force.

You will note, (See letter attached), that the Hendrick Mfg. Co. have given their consent to a change in the distribution of the monthly checks. You will be kind enough, therefore, when mailing checks for this month, and the following months, to send to the Hendrick Mfg. Co. the amount of thirty (\$30.00) Dollars, and to me the sum of eighty (\$80.00) Dollars. Total, one hundred (\$110.00) Ten Dollars, the same as before.

It seems mighty nice to be back again at the office. Everyone thinks I look splendid. I find, after having had typhoid, barring a relapse, you do feel improved. A little more starch in my legs and feet is all that I need.

With best regards to all my good friends in St. Louis, I beg to remain,

Yours very truly,

52

JAN. 22, 1912.

Ludlow-Saylor Wire Co., St. Louis, Mo.

Attention Mr. Low.

GENTLEMEN: The writer has taken up with the Hendrick Mfg. Co. the matter relative to the amount you are now paying for rent and stenographic services for this office. They agree to accept, until further notice, \$12.50 to be charged up to rent and \$17.50 to be charged up to salary for Miss Rittenhouse. This change to apply this month. You will, therefore, please be guided accordingly.

Yours very truly,

LUDLOW-SAYLOR WIRE CO.

WITNESS (continuing): I received the foregoing letters from the Ludlow-Saylor Wire Company dated January 18th, May 29th and July 27th, 1912. Also the letter from Hendrick Manufacturing Company dated 1/18/12. I signed and sent Ludlow-Saylor Wire Company the foregoing letters dated January 23rd, 1911, and Jan-

uary 22, 1912. The letter dated January 23, 1911, was written on January 23, 1912, and was dated January 23, 1911, by mistake.

The foregoing letters objected to as incompetent, irrelevant and immaterial to any issue made in the case.

The summons in this suit was presented to me at my office some time during the month of May, 1912. On receipt thereof I forwarded it to the Ludlow-Saylor Wire Company at St. Louis and received reply from Mr. Frank Low.

53 Objected to as incompetent, irrelevant and immaterial as regards any issue in this inquiry.

The reply which I received was in writing.

Witness produced the reply and his letter to which it is a reply, and the same were offered in evidence on behalf of complainant and were placed upon the record as follows:

MARCH 12, 1912.

Mr. Frank P. Low, St. Louis, Mo.

DEAR MR. LOW: I enclose, herewith, subpoena which was received to-day by messenger from the Supreme Court, the bearer of this paper also had a subpoena to be served upon you personally, but as you were not here, of course nothing could be done.

If there is anything you wish me to do in connection with this notice, please advise.

Yours very truly,

The Ludlow Saylor Wire Company.

ST. LOUIS, March 14, 1912.

Mr. B. C. Guerin, New York City.

DEAR SIR: Replying to yours of the 12th in which you enclose subpoena from the Supreme Court, we have referred this to our attorney who will attend to the matter. There is nothing we care for you to do further in connection with this notice.

54 We do not know what reply you made to this service. It would probably have been better if you had told the party you were simply serving us in the way of a broker but it doesn't make any difference anyway; we will have to answer the summons and will take charge of it.

Yours truly,

THE LUDLOW SAYLOR WIRE CO.,
FRANK LOW, *Vice-President*.

Defendant objects to the foregoing letter and reply upon the ground that they are incompetent, irrelevant and immaterial. Defendant makes no objection upon the ground that the copy is not the best evidence.

The only property of the Ludlow-Saylor Wire Company which I kept in the New York office were such papers as I considered of a

personal nature and which applied in almost every instance to the contract which existed between the Ludlow-Saylor Wire Company and myself. The Ludlow-Saylor Wire Company wrote me a letter stating that they were withholding a certain amount of money due me in earned commissions, which money they stated would be forthcoming when papers, price list, and display board were received by them. This material was crated, shipped to them and copy of shipping notice sent to the Ludlow-Saylor Wire Company. In due course I received a check from them covering the amount of commissions referred to and due me. I, therefore, presume that the shipment as sent to them was satisfactory else they would not have mailed me check for commissions due me. To date I have heard no further reference in this connection, and, therefore, considered the matter closed.

55 I also had in New York while my business relations with the Ludlow-Saylor Wire Company continued printed letter-heads and envelopes, catalogues and such additional papers as would accumulate from correspondence in connection with inquiries received, replies to such inquiries and a few original orders. I mean by that orders of a customer to the Ludlow-Saylor Wire Company. In addition to the foregoing, there was a miscellaneous lot of samples of wire cloth as manufactured by the Ludlow-Saylor Wire Company.

I never carried enough wire cloth to fill an order directly. I was delegated to sell wire cloth only, and authorized to dispose of no other kind of material. It was my practice to take orders both at prices determined by me and at prices established by the Ludlow-Saylor Wire Company. Upon receipt of an order I always acknowledged it from this office. I can not say positively, but I presume that the St. Louis office of the Company acknowledged receipt of orders sent to them from the New York office. When I say that I acknowledged receipt of orders I mean that I informed the customer that the order was received and would be filed, unless his order contained some clause which had not been previously agreed to.

The style of screen known in the trade as "Rek-Tang" screen is manufactured by the Ludlow-Saylor Wire Company of St. Louis, Missouri. The style of screen known as the "Ton-Cap" screen is manufactured by the W. S. Tyler Company of Cleveland, Ohio.

Q. 68. Did you ever sell Rek-Tang screens to customers who had previously been using Ton-Cap screens?

Object to that question as incompetent, irrelevant and immaterial.

56 A. I have sold Rek-Tang screens to customers who have told me that they have used Ton-Cap screens.

Object to so much of that answer as stated to what someone else has told the witness and move that it be stricken out.

Q. 69. In such cases have you ever secured from the customer a sample of the Ton-Cap screen which he told you he had been using?

The question is objected to as incompetent, irrelevant and immaterial.

A. Yes.

Q. 70. Then the customer not only told you that he had been using a Ton-Cap screen but gave you a sample of the screen which he had been using?

A. Yes, sir.

Q. 71. Did you secure such samples by instructions from the St. Louis office or without any instructions concerning the matter?

Objected to as incompetent, irrelevant and immaterial.

A. I received instructions to obtain such samples as I could of Ton-Cap screen from the Ludlow Saylor Wire Company. I also on my own account obtained as many samples as I could of Ton-Cap.

Q. 72. Your last answer is a little obscure and I ask you therefore if you received instructions from the Ludlow-Saylor Wire Company in some cases to obtain such samples of Ton-Cap screens?

A. Yes, sir, I did.

Q. 73. What did you do with such samples of Ton-Cap screen?

A. It was forwarded to the Ludlow-Saylor Wire Company at St. Louis, Mo.

Q. 74. Do you know what use they made of them?

57 Objected to as irrelevant and immaterial.

A. If the samples were supplied in connection with an order which had been received the sample was obtained for the purpose of determining the method to be employed in making up screens for the Rek-Tang type, as well as to determine as far as possible the gauge of the wire used and the size of the opening to be made.

Q. 75. You say that these samples were used to determine as far as possible the gauge of the wire and the size of the opening. Were they used also to determine the quality of wire?

Objected to as irrelevant and immaterial.

A. I do not know.

WITNESS (continues): The name of the Ludlow-Saylor Wire Company appeared in the usual manner in the telephone directory in the City of New York as "Ludlow-Saylor Wire Company, 30 Church Street, Cortlandt 2370." My personal name appeared not in connection with that of Ludlow-Saylor Wire Company, but separately in its proper place alphabetically.

I sold an order of Rek-Tang screen to Lebedjeff Engineering Company in this City (New York). I cannot say if the sample submitted is a sample of the Rek-Tang screen which I sold to the Lebedjeff Engineering Company.

Counsel for defendant has submitted certain letters concerning this sale to the Lebedjeff Company and a sample of screen.

I believe the sample of wire cloth submitted by the Lebedjeff Company in its letter dated January 25, 1912, and attached to my letter from the New York office dated January 26, 1912, on the same subject to be a sample of Ton-Cap screen. The ground
58 of my belief is that I had not on any previous occasion sold Rek-Tang style of screen to the customer and I, therefore,

draw the inference that the sample submitted was not the Rek-Tang style of screen. I could not tell by inspection whether the sample was a Ton-Cap screen or a Rek-Tang screen. They look the same to me. This is true of other sizes of screens as well as the size desired by Lebedjeff Company. The envelope which I used **generally at that time for the Ludlow-Saylor Wire Company's business in New York contained in the upper corner the words "If not delivered in five days, return to the Ludlow-Saylor Wire Company, 30 Church Street, New York."**

Counsel for complainant offers in evidence the contract between the Ludlow-Saylor Wire Company and Guerin and this is placed in the record as follows:

The Ludlow Saylor Wire Company.

SAINT LOUIS, January 23, 1911.

Agreement Between the Ludlow Saylor Wire Co., St. Louis, and Mr. B. C. Guerin, 30 Church Street, New York.

It is understood that we make an arrangement with you covering the first (6) six months of this year. We to assume one-half the salary of the stenographer, which you say is \$70.00, which would **equal \$35.00 per month.** Also one-half your office rent which you state is \$50.00 per month. This would mean \$25.00 which we would assume. Making the total amount \$60.00 per month. We to pay this amount monthly to the Hendrick Manufacturing Company, Carbondale, Pa.

59 We also agree to pay you \$50.00 per month salary and allow you a commission of 5% on your sales. This 5% commission on sales to be based upon sales of \$3,000.00 or over for six months. No commission to be paid on less than that amount.

We make this arrangement covering the first six months of this year, and at the end of that time we can take the matter up again and can then arrive at some conclusion as to what further arrangements should be made that would be equitable to both.

Yours very truly,

THE LUDLOW SAYLOR WIRE CO.,
FRANK LOW, V. P.

(Signed) B. C. GUERIN.

January 24, 1911.

Direct-examination closed.
No cross-examination.

Cahall Deposition.

WILLIAM P. CAHALL, a witness called on behalf of complainant, testified as follows:

I am thirty-four years of age, reside at No. 930 Simpson Street, New York City, and am Eastern Representative of the W. S. Tyler Company, manufacturers of wire cloth and mining screen located in Cleveland, Ohio. It also manufactures ornamental iron. I have been connected with the Company as its Eastern Representative since September 1, 1908. I looked after the wire cloth and
60 mining screen business. This company manufactures wire cloth and mining screen in large quantities, and is the largest, I believe, in the United States in the manufacture of wire cloth and mining screen. It puts a wire cloth or screen on the market known under the name of "Ton-Cap."

Q. 10. What is the reputation of Ton-Cap screen on the market?

Objected to as incompetent, irrelevant and immaterial.

A. From all reports, I believe, it has been very satisfactory for the purposes for which it has been purchased.

Q. 11. For what is it used mostly?

Same objection.

A. Principally mining screen.

Q. 12. Has this Ton-Cap had a large and ready sale on the market?

Same objection.

A. Yes, since I have been connected with the company.

Q. 13. Can it be used for other purposes than mining screen?

A. Yes, there is a quite a quantity of it being used in the manufacture of cement.

I directed the purchase of screens from the defendant through the V. V. Lebedjeff Engineering & Supply Company of New York. I called at their office in person, and had a verbal conversation with a Mr. M. C. Fairchild, their purchasing agent. I first advised him that I was desirous of securing possession of a quantity of Rek-Tang screens as manufactured by the Ludlow-Saylor Wire Company, but wished it to be the same or have it stated as being the same as the small sample which I left with him at that time;
61 which was taken from a sample which I had with me of our Ton-Cap screen. I had this sample cut so that Mr. Fairchild could himself readily break a small piece off which was to be sent to Ludlow-Saylor Wire Company's New York house. Mr. Fairchild then wished to know for what purpose this screen was desired. I informed him that it was wanted for experimental and testing purposes; however, he could say when asking for quotation that the same was for export to South America, and that I would send him a confirmation to this effect and he stated that in case I would do this he would purchase the screen for me.

They placed the order with the New York office of the Ludlow-Saylor Wire Company after receiving a quotation from them, sending check in payment for same with the confirming order. I wrote a letter confirming my verbal order to Mr. Fairchild of the Lebedjeff Company and I produce a copy of that letter which is as follows:

The W. S. Tyler Company.

NEW YORK, Jan. 25, 1912.

V. V. Lebedjeff Engineering & Supply Co., No. 11 Broadway, New York City.

GENTLEMEN: This is to confirm my verbal order of January 24th, 1912, given to Mr. Fairchild, purchasing agent of your company, to secure price, quotations and order for us from the New York office of the Ludlow-Saylor Wire Company thirty (30) pieces of screen 12"x54" each, like the sample of our screen which I handed to Mr. Fairchild, which Ludlow-Saylor screen, as I informed him, is for export shipment to South America.

Yours very truly,

W. S. TYLER COMPANY,
By WM. P. CAHALL.

This Rek-Tang screens were received by the Lebedjeff Company by express, as per order.

Mr. Fairchild upon their arrival at the Lebedjeff Company's office telephoned me at our office; however, I was not in at the time. Upon my return I telephoned Mr. Fairchild and he stated that he had given the express people instructions to deliver them to our office.

They were delivered to our office and remained there until we moved from 11 Broadway. They are now at our office at 200 Fifth Avenue. They were delivered to me boxed and in good condition. I opened the box at the time and it contained the exact number and size of pieces which I had had Lebedjeff Company order. I obtained a sample of one of these screens from the box by sawing off a piece with a steel saw, which sample I here produce.

The sample was offered in evidence and marked "Complainant's Exhibit, Sample of Rek-Tang screen received through Lebedjeff."

There was no evidence that this box containing Rek-Tang screens had been interfered with or tampered with in any way before I opened it.

I produce a sample of the Ton-Cap screen which I gave to Mr. Fairchild for the purpose of ordering the screens which I received from the Ludlow-Saylor Wire Company. This piece of screen which I produce has a part of it cut out. I sawed this small piece nearly out of the larger piece, leaving just enough wires to hold it in place, so that Mr. Fairchild would see that the sample came from our Ton-Cap screen. I held the large piece in my hand and permitted Mr. Fairchild to take the small piece from it, which he did in my presence.

Q. 36. I show you a small piece of screen which has been identified by Mr. Guerin, the witness who *had* preceded you, as being a piece of screen that was sent to him by the Lebedjeff Company for the purpose of ordering the thirty pieces of screen from the Ludlow-Saylor Wire Company. Will you please examine this small piece of screen and state whether or not that is the piece that was removed from the larger sample of Ton-Cap which you have produced?

A. It is.

The larger piece of screen mentioned by the witness is here offered in evidence, and the same is marked "Complainant's Exhibit Ton-Cap Screen from which the Small Piece was given to the Lebedjeff Company." The smaller piece is also offered in evidence and the same is marked "Complainant's Exhibit Separated Piece of Screen given to Lebedjeff Company."

Q. 37. I notice a metal tag on the larger piece of screen you have produced. Is it customary for your company to use this form of tag on this class of screen?

A. Yes.

Q. 38. Please state whether or not a similar tag in form and shape, and substantially in design and color was used on the thirty pieces of Rek-Tang screen you received from Ludlow-Saylor Wire Company through Lebedjeff Company?

64 Objected to as irrelevant and immaterial to any issue in this case and being an attempt to inject evidence into this hearing to the defendant's plea to so much of the bill as charges infringement of patent and unfair competition which has been expressly excluded from consideration by an order of the Court entered herein dismissing so much of such bill as to all parts thereof as charged unfair competition and infringement of trade-mark by the defendant.

Counsel for complainant states that complainant has a perfect right to show the attitude of the defendant in dressing up its goods by complainant by the use of labels and other matters, and that the objection of the defendants shows that it has been aggravated to a very great extent.

Defendant renews its objection.

A. There was no metal tag or tags on these thirty pieces.

Q. 39. Did the exterior of the box which contained these thirty pieces of screens contain any label which was similar to the labels used by your company on the same class of goods?

Same objection.

A. They did with the exception that our labels called for Ton-Cap and labels in this box called for Rek-Tang.

Defendant objects to this testimony and moves that it be stricken out upon the further ground that the labels spoken of by the witness are the best evidence.

Q. 40. I show you a label and ask you to state if that is one like your company uses on boxes containing their Ton-Cap screens?

Same objection.

65 A. I have seen our labels, but I don't know that I have ever seen any on a box. I have seen the labels on the Rek-Tang screen box.

Q. 41. Well, how do the labels on the Rek-Tang screen box compare with the sample I have just shown you?

Same objections.

A. Very similar with the exception of the name.

Q. 42. Are they the same color and size?

Same objection.

A. To the best of my knowledge the Rek-Tang screen labels are a little more yellow.

The Ton-Cap screen label is here offered in evidence and the same is marked "Complainant's Exhibit, W. S. Tylers Co.'s Paper Label."

Defendants object to the introduction of said label for the same reasons heretofore urged against the testimony of this witness referring to any questions to charges of unfair competition and infringement of trade-mark.

Q. 43. I show you the correspondence, etc., as to the Lebedjeff Company's purchase of Rek-Tang screen and ask you to state if that substantially represents the manner in which this transaction was made to the best of your knowledge, such papers having been produced by defendant's counsel under the notice of this testimony?

A. These papers seem to be exactly the same as my correspondence in connection with this transaction except some additional ones produced on the part of defendant, and such correspondence is as follows:

65a The Ludlow-Saylor Wire Company.

NEW YORK, *January 26, 1912.*

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: We have an inquiry from V. V. Lebedjeff Engr. & Supply Co., this City, asking for price on 30-pieces wire cloth, 12"x54", as per sample enclosed, herewith. This material is for export shipment to South America.

Kindly let us have reply by return mail, and return sample.

Yours very truly,

LUDLOW-SAYLOR WIRE COMPANY.
B. C. GUERIN.

The Ludlow-Saylor Wire Company.

SAINT LOUIS, Mo., Feb. 29, 1912.

Mr. B. C. Guerin, New York, N. Y.

DEAR SIR: Answering yours of the 19th we have sent receipted invoice to V. V. Lebedjeff Engr. & Supply Co. as requested.

Yours truly,

THE LUDLOW-SAYLOR WIRE CO.
FRANK LOW, *Vice-Pres.*

F. L.-C.

66

V. V. Lebedjeff Engineering & Supply Co.

NEW YORK, January 25, 1912.

The Ludlow-Saylor Wire Co., 30 Church Street, City.

GENTLEMEN: Enclosed please find sample of wire cloth of which we wish to secure 30 pieces 12"x54".

Please let us have your very best price on this material packed for export shipment to South America, and oblige,

Yours very truly,

V. V. LEBEDJEFF ENGINEERING &
SUPPLY CO.

M. C. FAIRCHILD/W.

The Ludlow-Saylor Wire Company.

SAINT LOUIS, Mo., Jan. 29, 1912.

Mr. B. C. Guerin, New York, N. Y.

DEAR SIR: We have your favor of the 26th in which you refer to inquiry from V. V. Lebedjeff Engr. & Supply Co. We find that the sample which you sent us is equal to our # 164 Rek-Tang. You may quote on 30 Pcs. 12"x54" as per sample which you sent us, 32c. sq. ft. f. o. b. St. Louis.

Yours truly,

THE LUDLOW-SAYLOR WIRE CO.,
FRANK LOW, *V. P.*

F. L.-C.

67

JAN. 31, 1912.

Attention Mr. M. C. Fairchild.

V. V. Lebedjeff Engr. & Supply Co., 11 Broadway, City.

GENTLEMEN: Replying to your inquiry of the 25th inst. we are pleased to quote you for furnishing—

30-pieces, wire cloth, 12" x 54" as per your sample submitted which is our #164 Rek-Tang, the sum of 32 cents per sq. ft., f. o. b. St. Louis, Mo.

Thanking your for the inquiry and trusting we may be favored with your order, we beg to remain,

Yours very truly,

LUDLOW-SAYLOR WIRE COMPANY.
— — —, *Eastern Representative.*

Order No. 86. Date, Feb. 1, 1912.

M—V. V. Lebedjeff Engr. & Supply Co.

Ship to 11 Broadway, N. Y. City.

How ship Express

At above

Salesman Guerin

When—quickly

Buyer ———

Terms: Check herewith 2%—cash.

30—pcs. #164 Rek-Tang wire cloth, 12" x 54"—as per
sample submitted per sq. ft. 32¢..... \$43.20

Material to be properly packed for export.

Their order 1289 herewith.

68

Order No. 1289.

Order from

V. V. Lebedjeff Engineering & Supply Co.,

11 Broadway.

NEW YORK, Jan. 31, 1912.

To Ludlow-Saylor Wire Co., #30 Church St., City:

Please enter our order for the following:

Ship to us from factory stock by express collect for export shipment,

12130

30—pcs. # 164 Rek-Tang wire cloth 12" x 54" @ 32¢ per sq.
foot less 2% cash.

Please send us one of your catalogues.

Marks: —.

Yours very truly,

V. V. LEBEDJEFF ENGINEERING &
SUPPLY CO.,

Per FAIRCHILD.

The Ludlow Saylor Wire Company.

NEW YORK, Feb. 1, 1912.

Ludlow-Saylor Wire Company, St. Louis, Mo.

GENTLEMEN: We enclose, herewith, order #86 for the V. V. Lebedjeff Engineering & Supply Co. for 30 pieces of Rek-Tang Wire cloth to be shipped to them by express collect.

69 We also enclose their check for \$42.34 in payment for same, and would ask that you mail these people receipted invoice. We allow them 2% discount for cash.

Yours very truly,

LUDLOW-SAYLOR WIRE CO.,

B. C. GUERIN, Eastern Representative.

FEB. 1, 1912.

Attention Mr. Fairchild.

V. V. Lebedjeff Engineering & Supply Co., 11 Broadway, City.

GENTLEMEN: We are in receipt of your valued order #1289 for 30 pieces of wire cloth, also your check amounting to \$42.34 in payment of same, for which kindly accept our thanks.

In accordance with your request we are mailing you under separate cover copy of our catalog #41, also our catalog of Rek-Tang wire cloth, the contents of which we trust may be of interest.

Awaiting your further favors with interest, we beg to remain,

Yours very truly,

LUDLOW SAYLOR WIRE CO.,
B. C. GUERIN, *Eastern Representative.*

The Ludlow-Saylor Wire Company.

70

SAINT LOUIS, Mo., Feb. 5, 1912.

Mr. B. C. Guerin, New York, N. Y.

DEAR SIR: We are in receipt of your favor of the 1st enclosing your order #86 for V. V. Lebedjeff Eng. & Supply Co. We have entered this order and will make shipment in ten days, and have so advised these people.

Yours truly,

THE LUDLOW-SAYLOR WIRE CO.
FRANK LOW, *Vice-Pres.*

FL-C.

FEB. 5, 1912.

V. V. Lebedjeff Eng. & Supply Co., 11 Broadway, New York.

GENTLEMEN: We have your order of January 31st which you handed to our Mr. B. C. Guerin calling for 30 Pcs. Rek-Tang Screen. We have entered same and will make shipment within ten days. You understand all of our Rek-Tang cloth has to be made to order, and we do not carry any of these goods in stock.

We thank you kindly for this order and beg to remain,

Yours very truly,

THE LUDLOW-SAYLOR WIRE CO.

FL-C.

FEB. 19, 1912.

Ludlow-Saylor Wire Co., St. Louis, Mo.

GENTLEMEN: Referring to my order #86 for the V. V. Lebedjeff Engr. & Supply Co., we wish you would kindly send these people receipted invoice for this material, as requested in last paragraph of my letter of the 1st inst., with which communication we mailed you their check in payment of same.

Yours very truly,

LUDLOW-SAYLOR WIRE CO.
—— —, *Eastern Representative.*

The Ludlow-Saylor Wire Company.

St. Louis, Mo., 2/3/12.

Sold to V. V. Lebedjeff Engineering & Supply Co.

Shipper to New York, N. Y., 11 Broadway.

Your order No. 1289.

Factory Order No. 12130A.

Shipper Via. Am. Exp.

30—Pcs. 12" x 54" #164 steel Rek-Tang screen	
135 sq. ft., 32.....	43.20
2% cash86
	<hr/> 42.34

Net 120 lbs.

Box 42 "

Gro. 162 lbs.

Entered——

Received——

Price O. K. W.

Charged——

Paid——

No. 1822

Date 1/31/12

Paid Feb. 3, 1912

THE LUDLOW-SAYLOR WIRE CO.,
Per M. F. KOHNING, Jr.

72 Q. 44. I wish you would compare the list of papers covering the correspondence, etc., as to the Lebedjeff transaction which are above placed on the record with what papers you had in connection with this paper.

A. Of the papers above mentioned the following I do not have:

Letters from Mr. B. C. Guerin to Ludlow-Saylor Wire Company, dated February 29, 1912.

Letter from Frank Low, to Mr. B. C. Guerin, New York, N. Y., dated February 29, 1912.

Letter from Frank Low, V. P., to Mr. B. C. Guerin, New York, N. Y., dated January 29, 1912.

Salesman's slip to Ludlow-Saylor Wire Co. showing sale to V. V. Lebedjeff Engineering & Supply Company, 11 Broadway, New York City, dated February 1, 1912; this slip is from Mr. B. C. Guerin; (there is a stamp on this slip which is indistinct and contains the number 12130).

Letter from B. C. Guerin to Ludlow-Saylor Wire Company, St. Louis, Mo., dated February 1, 1912.

Letter from Frank Low, vice-president to Mr. B. C. Guerin, New York, N. Y., dated February 5, 1912.

Copy of letter from Eastern representative to Ludlow-Saylor Wire Company, dated February 19, 1912.

Q. 45. Among the correspondence that you have as to this trans-

action what papers do you find which were not among the papers furnished by defendant's counsel under the notice mentioned?

A. Letter from Frank Low, vice-president to V. V. Lebedjeff Engineering & Supply Co., 11 Broadway, New York, dated February 29, 1912.

Receipted invoice from The Ludlow-Saylor Wire Company, St. Louis, Mo., to V. V. Lebedjeff Engineering & Supply Company, dated 2/3/12.

73 Q. 46. With the exception of the copy of your letter of January 25, 1912, where did you get the other papers as to this correspondence, etc., which you have?

A. They were all handed to me by Mr. M. C. Fairchild of the V. V. Lebedjeff Company with the exception of a rough copy of order dated January 31, 1912. This Mr. Fairchild and Mr. Lebedjeff permitted me to copy from their order book.

The above correspondence as to the Lebedjeff transaction have been placed on the record and Mr. Cahall's letter of January 25, 1912, are offered in evidence and it is stipulated that the same be offered with the same force and effect as originals though only copies appear, subject to timely objection and correction.

It is stipulated that in the New York City directory for 1911 and 1912 the name "The Ludlow-Saylor Wire Company, 30 Church Street," appeared, and in the New York classified telephone directory of July, 1912, issue the following appears "Cortlandt 2670, The Ludlow-Saylor Wire Co., 30 Church."

Counsel for complainant offers in evidence copy of the trade journal or magazine known as Mining and Engineering World under date of March 9, 1912, wherein at page 13 an advertisement of the Ludlow-Saylor Wire Company appears and the same is marked "Complainant's Exhibit, Copy of Mining and Engineering World." Also pages 47 and 48 of the Mining and Scientific Press wherein on page 48 an advertisement of The Ludlow-Saylor Wire Company appears, and the same is marked "Complainant's Exhibit, Mining and Scientific Press."

74 Q. 47. Does the W. S. Tyler Company keep any stock of wire cloth or screens in New York?

Object to that question as irrelevant.

A. No.

Q. 48. Why not?

Object to that question as irrelevant and immaterial.

A. It is almost impossible to carry stock to meet the great variance in widths, meshes, size of wires, etc., which may be of an infinite variety of specifications. For this reason all of our orders are filled from our factory in Cleveland, and most of them made up after the orders have been received.

Direct examination closed

No cross-examination.

Fairchild Deposition.

(Stipulated.)

It is stipulated between counsel that if Mr. M. C. Fairchild were called he would testify that he is purchasing agent of the V. V. Lebedjeff Engineering & Supply Company, that in January, 1912, he received from W. P. Cahall, Eastern representative of the W. S. Tyler Company, the sample of screen produced by Cahall and marked "Complainant's Exhibit, Separated Piece of screen
75 given to Lebedjeff Company," that he took this piece from a larger piece also produced by Mr. Cahall and marked "Ton-Cap Screen from which the small piece was given to the Lebedjeff Company." That he ordered from the Ludlow-Saylor Wire Company, 30 Church Street, New York, thirty pieces of wire cloth like "Complainant's Exhibit, Separated piece of Screen, etc.," above referred to, sending such separated piece with his order. That the goods which he ordered were shipped to the Lebedjeff Company from the Ludlow-Saylor factory (at St. Louis, Mo.) as per his order, that he paid for same by check sent to Ludlow-Saylor Wire Company, 30 Church Street, New York. That he was informed by the express company of the receipt of the goods and that at the request of Mr. Cahall he had them sent directly from the express company to the W. S. Tyler Company, 11 Broadway, New York, and that the correspondence, invoice, order, etc., offered in evidence by Mr. Cahall were received by the Lebedjeff Company and given to Cahall by Fairchild.

Counsel for complainant offers in evidence United States Letters Patent No. 966,599, granted on August 9, 1910, to Morlay P. Reynolds, of Cleveland, Ohio, assignor to the W. S. Tyler Company of Cleveland, Ohio, for woven wire fabric for screens which is the patent in suit and the same is marked "Complainant's Exhibit, Reynold's Patent."

76

Workman Deposition.

HENRY C. WORKMAN, a witness called on behalf of complainant, testified as follows:

I am 42 years of age, reside at Briarcliff Manor, New York, and am a patent expert and patent solicitor.

Stipulated between counsel that Mr. Workman is qualified to testify as an expert.

I have read the patent in suit, Reynolds Patent No. 966,599, of August 9, 1910, and believe I understand the same. I have seen the sample of wire screen marked "Complainant's Exhibit, Sample of Rek-Tang Screen received through Lebedjeff Company" and have examined the same and compared it with the screen described in the patent in suit.

The patent referred to No. 966,599 patented August 9, 1910, to M. P. Reynolds is, as the title states, for a woven wire fabric for screens. This fabric, according to the specification of the patent is formed of warp and weft wires which are woven together, preferably

to form a fabric having an oblong mesh as indicated in the drawings; and it is stated, as at lines 14 and 15, page 1 of the specification, that the fabric is particularly adapted for screening purposes. The warp wires or the wires running longitudinally of the fabric are indicated on the drawing by the numerals 1, 2, 3, 4, etc. The weft or transverse wires are indicated on the drawing by the reference letters *a*, *b*, *c* and *d*. These weft wires are described in the patent as being larger in cross-section than the warp wires, and also as made of softer metal than the warp wires. The fabric formed by weaving

77 the warp and the weft wires is pressed or rolled, and as a result of this operation the weft wires are bent or pressed by the warp wires where the latter cross the weft wires so as to form seats which are indicated on the drawings by the reference letters *a'* *b'* *c* and *d*, in which seats the warp wires lie. Lines 51 to 65 of the specification (page 1) describe this feature. The advantage of this construction is explained by the inventor as resulting in a firm interlocking of the two sets of wires at their intersections and any tendency of the chute or weft wires to move relatively to each other is practically eliminated and a screening fabric produced in which the meshes remain uniform in shape and size and will not vary in these particulars as frequently occurs in the case of screening fabrics heretofore in common use. (See lines 4 to 17, page 2.) Further advantages of this feature of construction of fabrics, with weft wires softer than the warp wires, are set out by the inventor, such as the better withstanding of vibration and the prevention of the liability of the weft wires to crystallize or break in the rolling or pressing operation.

The interlocking feature is also again referred to as a feature of advantage in an oblong mesh screen in which the weft wires are necessarily fewer in number than the warp wires and spaced farther apart, as such interlocking, due to the softer character of the weft wires, maintains such wires in their proper spaced relation. I note further that, as to the larger size of the weft wires described by the patentee, it is pointed out in the patent that a greater capacity of screen is obtained since the warp wires are farther apart where they

78 cross the weft wires than at the central point of the mesh, and that this results in screens which do not become clogged. It is also apparent that the warp wires being harder than the weft wires are better able to stand the wear and abrasion than if they were of softer metal like the weft wires.

I find these several features I have referred to set out in the claims of the patent. Claim 1, which reads as follows:

"A metallic pressed or rolled fabric for a screen, comprising warp wires and weft wires, the weft wires being larger and being formed of softer metal than the warp wires and the warp wires being pressed into the weft wires and thereby interlocked therewith,"

specifies a metallic pressed or rolled fabric for a screen with the weft wires larger and formed of softer metal than the warp wires, the latter being pressed into the weft wires and thereby interlocked therewith.

Claim 2 is like claim 1, except that it omits the feature of the weft wires being larger and specifies only that they are of softer metal than the warp wires. In other respects the claims are identical.

CHARTS

TOO

LARGE

FOR

FILMING

Claim 3 reads as follows:

"A metallic unitary structure for a screen, comprising a pressed or rolled fabric embodying warp wires and weft wires, the weft wires being softer and spaced farther apart than the warp wires so as to produce an oblong mesh in the screen and the warp wires being pressed into the weft wires and thereby interlocked therewith."

This claim is like claim 4, the only difference between 79 claims 3 and 4 being that in claim 3 the weft wires are of softer metal than the warp wires, whereas in claim 4 the weft wires are specified as being both larger and of softer metal than the warp wires. With this difference between these two claims both said claims specify a metallic unitary structure for a screen comprising a pressed or rolled fabric embodying warp and weft wires, the weft wires being spaced farther apart than the warp wires so as to produce an oblong mesh.

I have examined the sample of wire screen marked "Complainant's Exhibit, Sample of Rek-Tang Screen received through the Lebedjeff Company" and have compared it with the patent in suit and with each claim thereof; and I find that it is practically an exact copy of the invention described and claimed in this patent. This sample corresponds to the screen specified in claim 1 of the patent in that it is a metallic pressed or rolled fabric, the flattening of the warp and weft wires where they cross indicating this pressing operation. The weft or transverse wires of this sample are, as specified in claim 1, larger than the warp wires, and, as I found by testing, are of softer metal than the warp wires. And the warp wires are pressed into the weft wires and thereby interlocked therewith.

In the same way I find the features specified in the second claim of the patent embodied in the sample referred to. As this claim, as I have pointed out, is the same as claim 1, except that it omits the specification of the weft wires as being larger than the warp wires it is not necessary for me to again point them out.

80 I also find the several features specified in claims 3 and 4 of the patent embodied in this sample. The only features I need refer to particularly in connection with these two claims in their comparison with the sample is the spacing farther apart of the weft wires, since in other respects these claims are similar to claims 1 and 2. It is obvious from an inspection of the sample that the weft or transverse wires are spaced considerably farther apart than the warp wires and produce an oblong mesh.

I, therefore, find as a result of a reading of the claims and a comparison of the sample referred to with the several claims of the patent that the sample embodies all the several features of each of said claims and as specified in each of said claims.

Direct-examination closed.

No cross-examination.

Complainant's testimony in chief closed.

No testimony on behalf of defendant.

(Here follow diagrams marked pages 80a, 81, 82 to 84.)

Morley P. Reynolds, of Cleveland, Ohio, Assignor to The W. S. Tyler Company, of Cleveland, Ohio, a Corporation of Ohio.

Woven-Wire Fabric for Screens.

966,5—; Patented Aug. 9, 1910.

Specification of Letters Patent.

Application Filed May 27, 1907. Serial No. 375,941.

To all whom it may concern:

Be it known that I, Morley P. Reynolds, a citizen of the United States of America, residing at Cleveland, in the county of Cuyahoga and State of Ohio, have invented certain new and useful Improvements in Woven-Wire Fabrics for Screens; and I hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use the same.

This invention relates to new and useful improvements in metallic fabric particularly adapted for screening purposes.

The object of my invention is to produce a metallic slot screen which will have a comparatively smooth plane surface, and will be constructed to withstand abrasion of particles coming in contact with the same, as well as one with greater discharging surface or air space than other screens heretofore produced, thus making it possible to pass a relatively larger tonnage of particles through the same.

My invention consists in the matter substantially as hereinafter claimed.

I shall now describe my invention so that others skilled in the art to which it appertains may manufacture and use the same, reference being had to the accompanying drawing, forming part of this specification, in which—

Figure 1 is a view of a wire fabric embodying my invention. Fig. 2 is a section on the line 2—2 of Fig. 1. Fig. 3 is a section on the line 3—3 of Fig. 1. Fig. 4 is a section on the line 4—4 of Fig. 1.

Like symbols of reference indicate like parts in each of the several figures.

In the drawing, 1, 2, 3, 4, 5, 6, 7, and 8, represent the warp wires, which are preferably circular in cross-section, and *a*, *b*, *c*, and *d*, represent the chute or weft wires, which may be either circular or rectangular in cross-section and are shown as being considerably larger in cross-sectional area than the warp wires. The chute or weft wires are also made of a softer metal than the warp wires.

In forming my improved fabric the warp and the weft wires are preferably so woven together, as illustrated in the drawing, as to produce a fabric having an oblong mesh. The fabric thus woven is then pressed or rolled in order to bring the surfaces of the warp wires

and the weft wires, where they cross one another, into substantially the same plane. During this pressing or rolling operation, as the chute wires are of softer metal than the warp wires, the chute wires will be bent or pressed by the pressure of the warp wires, where they cross the chute wires, so as to form seats, as at a' , b' , c' , and d' , in which seats the warp wires lie. The surface of the fabric where the wires cross one another will then be in substantially the same plane, but neither the warp wires nor the chute wires will be flattened to any great extent, and each of the warp wires will maintain the crimped or undulating form which was imparted to it during the weaving operation. Therefore the portion of each warp wire between any pair of chute wires will be inclined in the opposite direction to the adjoining portion of each warp wire at each side thereof. To illustrate, assuming that the screen is lying in a horizontal position, and taking for consideration the portions of the wires 2 and 3 lying between the chute wires a and b ;—it will be seen that where the wires 2 and 3 cross the chute wire a the wire 2 is underneath the chute wire a and the wire 3 is above the same. The wire 2 then inclines upwardly and passes over the chute wire b while the wire 3 inclines downwardly and passes underneath the chute wire b , so that where the wires 2 and 3 cross the wire a the wire 3 is above the wire 2, while the central portions of said wires 2 and 3 between said chute wires a and b are in the same horizontal plane. Now if the distance between the said portions of the wires 2 and 3 at their central points between the wires a and b and the distance between them where they cross either of the chute wires a or b be measured, it will be found that said wires 2 and 3 are farther apart where they cross the chute wires a and b than they are at their said central points, and although the difference is comparatively slight it can be positively observed. In this way I produce a metallic wire fabric in which each mesh or opening has a greater capacity, at its ends than at its center, and in actual use I have found this to be a most valuable feature, as screens constructed of such a fabric do not become clogged and are free from other objections common to ordinary screens.

Another advantage of my invention lies in this that by reason of the pressing or rolling operation to which the woven fabric is subjected and of the fact that the chute or weft wires are of softer metal than the warp wires the two sets of wires are firmly interlocked with each other at their intersections, and any tendency of the chute wires to move relatively to each other is practically eliminated, and a screening fabric is produced in which the meshes will remain uniform in shape and size and will not vary in these particulars as frequently occurs in the case of screening fabrics heretofore in common use. Also by forming the chute wires of softer metal than the warp wires the fabric will better withstand vibration and the chute wires the extreme bending to which they are subjected in the crimping over and under the hard warp wires. Hard chute wires crimped and compacted or pressed or rolled in the manner described would crystallize and be very liable to break easily owing to their lack of ductility. It will be understood, of course, that the difference in the

hardness between the chute and the warp wires will naturally depend upon the service to which the screening fabric is to be put. In some screens the difference will be quite marked; in others not so great. The chute wires are also preferably made larger than the warp wires for the purpose of strengthening the screen, as there are fewer chute wires than warp wires and also being softer than the warp wires they are more liable to wear and abrasion and hence should be larger to withstand the wear equally with the warp wires. In the oblong mesh screen it is necessary to have the weft wires interlocked with the warp wires to positively maintain such wires in their proper spaced relation with each other.

I claim:—

1. A metallic pressed or rolled fabric for a screen, comprising warp wires and weft wires, the weft wires being larger and being formed of softer metal than the warp wires and the warp wires being pressed into the weft wires and thereby interlocked therewith.

2. A metallic pressed or rolled fabric for a screen, comprising warp wires and weft wires, the weft wires being formed of softer metal than the warp wires and the warp wires being pressed into the weft wires and thereby interlocked therewith.

3. A metallic unitary structure for a screen, comprising a pressed or rolled fabric embodying warp wires and weft wires, the weft wires being softer and spaced farther apart than the warp wires so as to produce an oblong mesh in the screen and the warp wires being pressed into the weft wires and thereby interlocked therewith.

4. A metallic unitary structure for a screen comprising a pressed or rolled fabric embodying warp wires and weft wires, the weft wires being larger and of softer metal and spaced farther apart than the warp wires so as to produce an oblong mesh in the screen and the warp wires being pressed into the weft wires and thereby interlocked therewith.

In testimony whereof, I sign the foregoing specification, in the presence of two witnesses.

MORLEY P. REYNOLDS.

Witnesses:

VICTOR C. LYNCH.

B. C. BROWN.

It Is Stipulated that the foregoing record contains all the evidence taken in this action and that the same be incorporated into the transcript on appeal.

New York, September 24, 1913.

D. ANTHONY USINA,

Solicitor for Complainant.

AUGUSTUS N. HAND,

Solicitor for Defendant, who, However, Appears Specially to Object to the Right of this Cause to be Heard upon the Appeal which the Complainant has Attempted to Take.

Order Settling Record.

On the above stipulation the foregoing statement of the evidence is approved and it is

Ordered, that the same be incorporated into the transcript of record on appeal.

New York, September 25, 1913.

C. M. HOUGH, *Judge.*

(Filed Sept. 29, 1913.)

88

Memorandum.

United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,

vs.

THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

On the evidence I am of the opinion that the defendant has sustained the allegations of the plea that the defendant did not have a regular and established place of business in this District.

The sale to Lebedjeff Company was accepted at St. Louis and the goods were shipped from there. On the facts, I am satisfied that the sale was a Missouri sale, and, consequently, that an act of infringement was not committed within the Southern District of New York.

Upon these conclusions as to the facts, the law of the case is to be found in Judge Lacombe's opinion (C. R. XXXI).

I think that under the new Equity Rules defendant is entitled to the dismissal of the bill.

July 8, 1913.

J. M. MAYER,
District Judge.

Settle decree on five days' notice.

— — —, *D. J.*

Filed July 8, 1913.

Final Decree.

At a Stated Term of the United States District Court Held at the United States Post Office on the 6th Day of August, 1913.

Present: Hon. Julius M. Mayer, United States District Judge.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,
against
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

This cause came on to be heard on Bill of Complaint for infringement of Patent, plea to the jurisdiction and proofs, at this term, and was argued by J. Negley Cooke, of Counsel for the complainant, and James P. Dawson, of Counsel for the defendant, and thereupon upon consideration thereof, and on motion of Augustus N. Hand Solicitor for the defendant herein (appearing specially for the purpose of objecting to the jurisdiction of the Court and moving to dismiss the Bill of Complaint) it was

Ordered, Adjudged and Decreed as follows, viz.:

That the defendant, Ludlow-Saylor Wire Company has had no regular and established office and place of business within the Southern District of New York;

The complainant has failed to show a sale of defendant's goods within the Southern District of New York;

90 That the sale to Lebedjeff Company by the defendant was made in the City of St. Louis, Missouri, and the goods were shipped from there, and the said sale was a Missouri sale and was not made within the Southern District of New York;

That the defendant has committed no act of infringement of complainant's alleged patent within the Southern District of New York; And it was further

Ordered, Adjudged and Decreed That complainant's bill herein be dismissed for lack of jurisdiction of this Court.

(Sg.)

JULIUS M. MAYER,
United States Judge.

Approved as to form:

D. ANTHONY USINA,
Solicitor for Complainant.

AUGUSTUS N. HAND,
*Solicitor for Defendant, Appearing Specially
for the Purpose of Objecting to the Jurisdiction.*

Filed Aug. 6, 1913.

91

Copy.

In the District Court of the United States for the Southern District
of New York.

In Equity. 9-101.

W. S. TYLER COMPANY Complainant,

vs.

LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Certificate.

To the Chief Justice and the Associate Justices of the Supreme Court
of the United States:

I hereby certify that the decree entered in the above entitled case
on, to wit, August 5th, 1913, sustaining the pleas of defendant and
dismissing the bill of complaint was a decree on the sole question
of the jurisdiction of this Court.

JULIUS M. MAYER, *Judge.*

Dated, March 27, 1914.

Filed March 27, 1914.

92

Copy.

At a Stated Term, to wit, the — Term, A. D. 19—, of the District
Court of the United States for the Southern District of New York,
Held at the Court Room, in the United States Post-Office Build-
ing, in the City of New York, on the — day of —, A. D. 1914.

Present: Hon. Julius M. Mayer, United States District Judge.

In Equity. 9-101.

W. S. TYLER COMPANY Complainant,

vs.

LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Order Allowing Appeal.

On motion of D. Anthony Usina, Esq., Solicitor and of Counsel
for complainant, it is

Ordered, that an appeal to the Supreme Court of the United States
from the final decree heretofore filed and entered herein be, and the
same hereby is, allowed, and that a certified transcript of the record,
testimony, exhibits, stipulations and all proceedings herein be forth-
with transmitted to said Supreme Court of the United States. It is

Further ordered, that a bond for costs and damages on appeal be fixed at the sum of Two hundred and Fifty (\$250.00) Dollars.

JULIUS M. MAYER,
District Judge.

Dated March 27, 1914.

Filed March 27, 1914.

93

Copy.

In the District Court of the United States for the Southern District
of New York.

In Equity. 9-101.

W. S. TYLER COMPANY, Complainant,
vs.
LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Petition for Allowance of Appeal.

The above named complainant, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 5th day of August, 1913 wherein and whereby it was ordered, adjudged and decreed that complainant's bill be dismissed for lack of jurisdiction of this Court, does hereby appeal from the said order and decree of the 5th day of August, 1913 to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein and it prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

D. ANTHONY USINA,
Solicitor for Complainant.

Dated, March 27, 1914.

Filed March 27, 1914.

94

Copy.

In the District Court of the United States for the Southern District
of New York.

In Equity. 9-101.

W. S. TYLER COMPANY, Complainant,
vs.
LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Assignment of Errors.

Comes now the complainant and files the following assignment of errors upon which it will rely upon its prosecution of its appeal from

the decree made by this Honorable Court on the 5th day of August, 1912 in the above entitled cause.

I.

In dismissing complainant's bill for lack of jurisdiction of this Court.

II.

In not making, rendering and entering a decree in favor of the complainant and against the defendant, sustaining the validity of the patent sued on, adjudging an infringement thereof by the respondent and granting an injunction against the respondent restraining it from further infringement.

III.

In holding that the defendant has had no regular and established office and place of business within the Southern District of New York.

IV.

In holding that complainant has failed to show a sale of defendant's goods within the Southern District of New York.

V.

In holding that the *sale* to Lebedjeff by the Defendant
95 was made in the City of St. Louis, Missouri and the goods
were shipped from there and the said sale was a Missouri sale
and was not made within the Southern District of New York.

VI.

In holding that the defendant has committed no act of infringement of the complainant's alleged patent within the Southern District of New York.

VII.

In failing to hold that the conduct of the defendant's business showed it to have a regular and established place of business in the Southern District of New York and to have committed acts of infringement within said District.

D. ANTHONY USINA,
Solicitor for Complainant.

Dated, March 27, 1914.

Filed March 27, 1914.

Appeal Bond.

Filed April 3, 1914.

Know all men by these presents, That we, W. S. Tyler Company of Cleveland, Ohio, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under and by virtue of the laws of the State of Maryland, having an office and usual place of business at No. 47 Cedar Street, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the Ludlow-Saylor Wire Company, in the full and just sum of Two Hundred and Fifty Dollars—(\$250.00), to be paid to the said Ludlow-Saylor Wire Company its certain attorney, executors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 31st day of March, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately in a suit pending in the United States District Court for the Southern District of New York, between W. S. Tyler Company, complainant, and Ludlow-Saylor Wire Company, defendant, an order and decree was made and entered on the 6th day of August, 1913, wherein and whereby it was ordered, adjudged and decreed that complainant's appeal be dismissed for lack of jurisdiction of the said Court, and the said W. S. Tyler Wire Company having obtained an order allowing an appeal and filed a copy thereof in the Clerk's office of the said Court, to reverse the decree in the aforesaid suit, and a citation directed to the said Ludlow-Saylor Wire Company citing and admonishing it to be and appear at the Supreme Court, of the United States, at Washington, within eighteen days from the date thereof.

97 Now, the condition of the above obligation is such, That if the said, W. S. Tyler Company of Cleveland, Ohio, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void: else to remain in full force and virtue.

[SEAL.]

[SEAL.]

W. S. TYLER COMPANY,
By PROCTOR PATTERSON, *V. Pres't.*
UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By S. FRANK HEDGES,

Attorney-in-Fact.

Attest:

WILLIAM H. ESTWICK,

Attorney-in-Fact.

Signed, Sealed and Delivered in the presence of

E. P. DISBRO.

C. ZIMMERMAN.

STATE OF OHIO,

County of Cuyahoga, ss:

On this 31st day of March, 1914, before me personally appeared Proctor Patterson of W. S. Tyler Company with whom I am personally acquainted, who being by me duly sworn said: That he resides in the State of Ohio; that he is Vice-President of W. S. Tyler Company, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to the within instrument is such seal; that it was so affixed by the order of the Board of Directors of said corporation and that he signed his name thereto as officer by like authority.

And the said Earl P. Disbro further says that he is acquainted with Proctor Patterson and knows him to be the Vice-President of the said corporation; that the signature of the said Proctor Patterson subscribed to the said instrument is in the genuine handwriting of the said Proctor Patterson and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said Earl P. Disbro.

[SEAL.]

EARL P. DISBRO,
Notary Public.

My commission expires Oct. 13, 1914.

98 *Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.*

[Emblem.]

STATE OF NEW YORK,

County of New York, ss:

Before me personally came S. Frank Hedges known to me to be Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of W. S. Tyler Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney in Fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of W. S. Tyler Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney in Fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H.

Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 30 day of Mar. 1914.

[SEAL.]

C. D. MARSAC,
Notary Public, New York County, No. 2532.

Certificate filed in Westchester, Nassau, Putnam, Orange, and Suffolk Counties.

Register's Office No. 5104.

Term Expires Mar. 30, 1915.

99 United States District Court, Southern District of New York.

In Equity. 9-101.

THE W. S. TYLER COMPANY, Complainant,

vs.

THE LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Stipulation as to True Transcript of Record.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, April 3, 1914.

D. ANTHONY USINA,

Attorney for Complainant.

AUGUSTUS N. HAND,

Attorney for Defendant, Who, However, Appears Specially to Object to the Jurisdiction of This Court and the Right of This Cause to be Heard upon the Appeal Which the Complainant Has Attempted to Take.

Filed April 8, 1914.

100 United States District Court, Southern District of New York.

In Equity. 9-101.

W. S. TYLER COMPANY, Complainant,
vs.
LUDLOW-SAYLOR WIRE COMPANY, Defendant.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Ludlow-Saylor Wire Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 13th day of April, A. D. 1914, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the United States District Court for the Southern District of New York from a final decree signed, filed and entered, in that certain suit, being in equity No. 9-101, wherein the W. S. Tyler Company is Complainant-Appellant and you are Defendant-Appellee, to show cause, if any there be, why the decree rendered against the said Appellant, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the party in that behalf.

Witness the Honorable Julius M. Mayer, United States District judge for the second judicial circuit, this 27 day of March, in the year of our Lord one thousand nine hundred and fourteen.

JULIUS M. MAYER,
District Judge.

Acknowledged service of a copy of the within citation this 27th day of March, 1914.

AUGUSTUS N. HAND,
*Solicitor for Defendant-Appellee, Appearing Specially
and Objecting to the Jurisdiction.*

Dated, New York, March 27, 1914.

[Endorsed:] E. 9/101. Equity. 9-101. United States District Court, Southern District of New York. W. S. Tyler Company, Complainant, vs. Ludlow-Saylor Wire Company, Defendant. Citation on Appeal. D. Anthony Usina, Esq., Solicitor for Complainant, 71 Broadway, New York City. U. S. District Court, S. D. of N. Y. Filed Mar. 27, 1914.

101 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE W. S. TYLER COMPANY, Complainant-Appellant,
vs.
THE LUDLOW-SAYLOR WIRE COMPANY, Defendant-Appellee.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 8th day of April in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-eighth.

[Seal District Court of the United States, Southern District
of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 24,161. S. New York D. C. U. S. Term No. 1010. W. S. Tyler Company, appellant, vs. Ludlow-Saylor Wire Company. Filed April 11th, 1914. File No. 24,161.

Office Supreme Court,
FILED
OCT 2 1914
JAMES D. WARD
Cl

IN THE
United States Supreme Court

OCTOBER TERM 1914

W. S. TYLER COMPANY,
Appellant,
vs.
LUDLOW-SAYLOR WIRE COMPANY,
Appellee.

No 441

Notice of Motion to Advance Hearing on Appeal

Please Take Notice that on Monday, October 12th, 1914, at the opening of the Court or as soon thereafter as counsel can be heard we will present the attached Motion before the Supreme Court of the United States.

Dated, September, 10, 1914.

D. ANTHONY USINA,
Solicitor for Appellant.

To:

Augustus N. Hand, Esq.,
No. 49 Wall Street,
New York City.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1914

W. S. TYLER COMPANY,	}
Appellant,	
vs.	
LUDLOW-SAYLOR WIRE COMPANY,	}
Appellee.	

**Motion to Advance Hearing on Ap-
peal**

And now comes W. S. Tyler Company, Appellant, by its solicitor, and shows that it has presented an appeal to this Honorable Court on the 13th day of April, 1914 involving only a question of jurisdiction, and

MOVES, that the hearing on said appeal be advanced.

And said appellant further shows that it has also presented a Petition for Certiorari dated, October 12, 1914, and therefore further

MOVES, that the hearing on the said appeal be set for the same day as the hearing on the said Certiorari.

W. S. TYLER COMPANY,
By D. Anthony Usina,
Its Solicitor.

Dated, September, 10, 1914.

J. N. COOKE,
C. C. LINTHICUM,
Counsel.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1914

W. S. TYLER COMPANY,	}
Appellant,	
vs.	}
LUDLOW-SAYLOR WIRE COMPANY,	
Appellee.	

Affidavit

State of New York, }
County of New York. } ss:

William X. Seewagen, being duly sworn, deposes and says that on September 10, 1914 at noon, he served the attached Notice of Motion to Advance Hearing on Appeal, upon Augustus N. Hand, Solicitor for Appellee, by leaving a copy of the same with the person in charge of his office.

WILLIAM X. SEEWAGEN.

Sworn to and subscribed before me this
11th day of September, 1914.

Lulu Stubenvoll,
Notary Public.

(Seal)



No. 441

Office Supreme Court, U.

FILED

NOV 7 1914

JAMES D. MAHER

CLERK

IN THE

United States Supreme Court

THE W. S. TYLER COMPANY

Appellant

vs.

THE LUDLOW-SAYLOR WIRE COM-
PANY

Appellee

IN EQUITY

BRIEF FOR APPELLANT

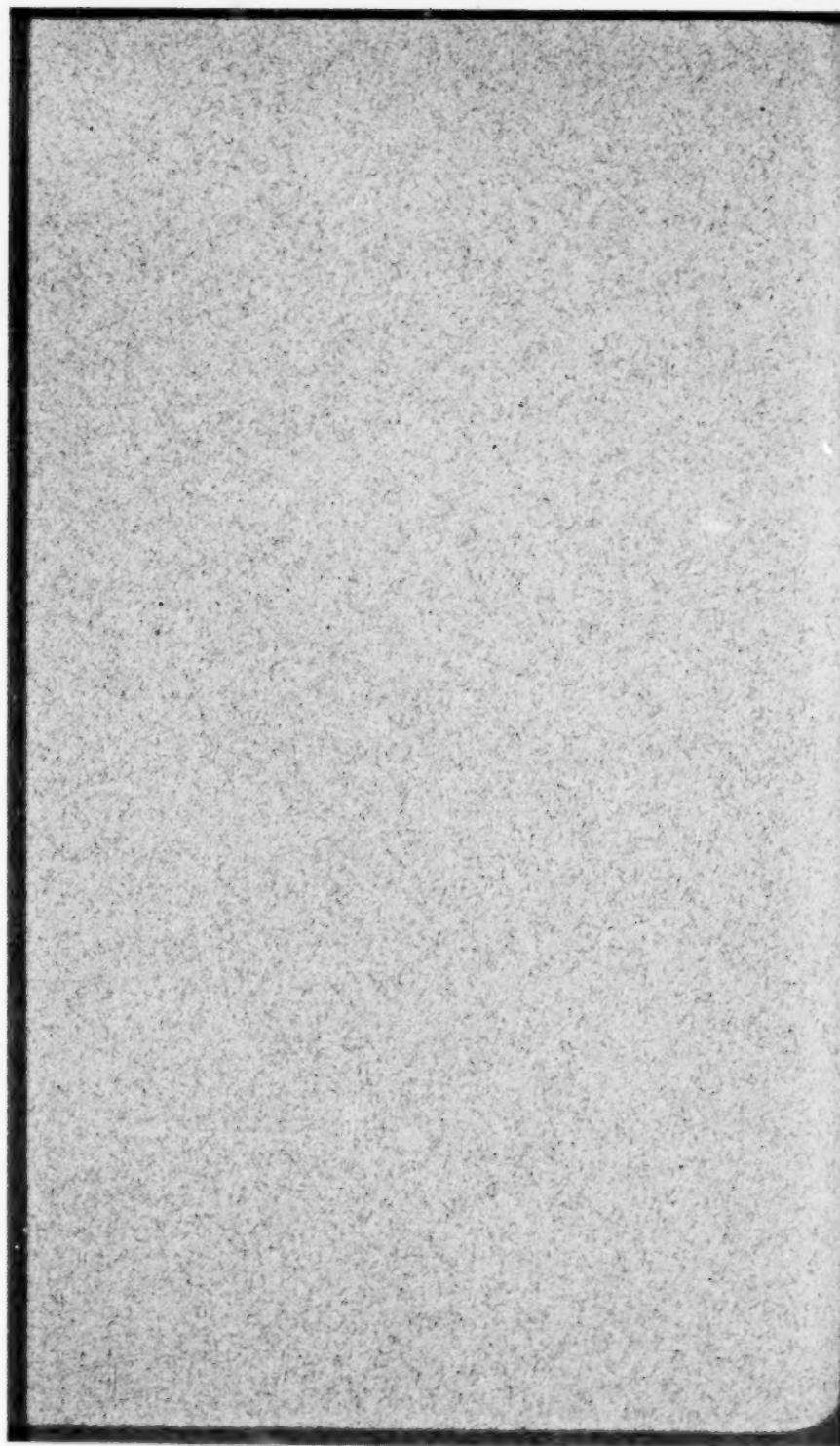
J. NEGLEY COOKE

D. ANTHONY USINA

CHARLES C. LINTHICUM

Counsel for Appellant

THE ARTHUR H. CRIST Co., Cooperstown, N. Y.
New York Office, 220 Broadway

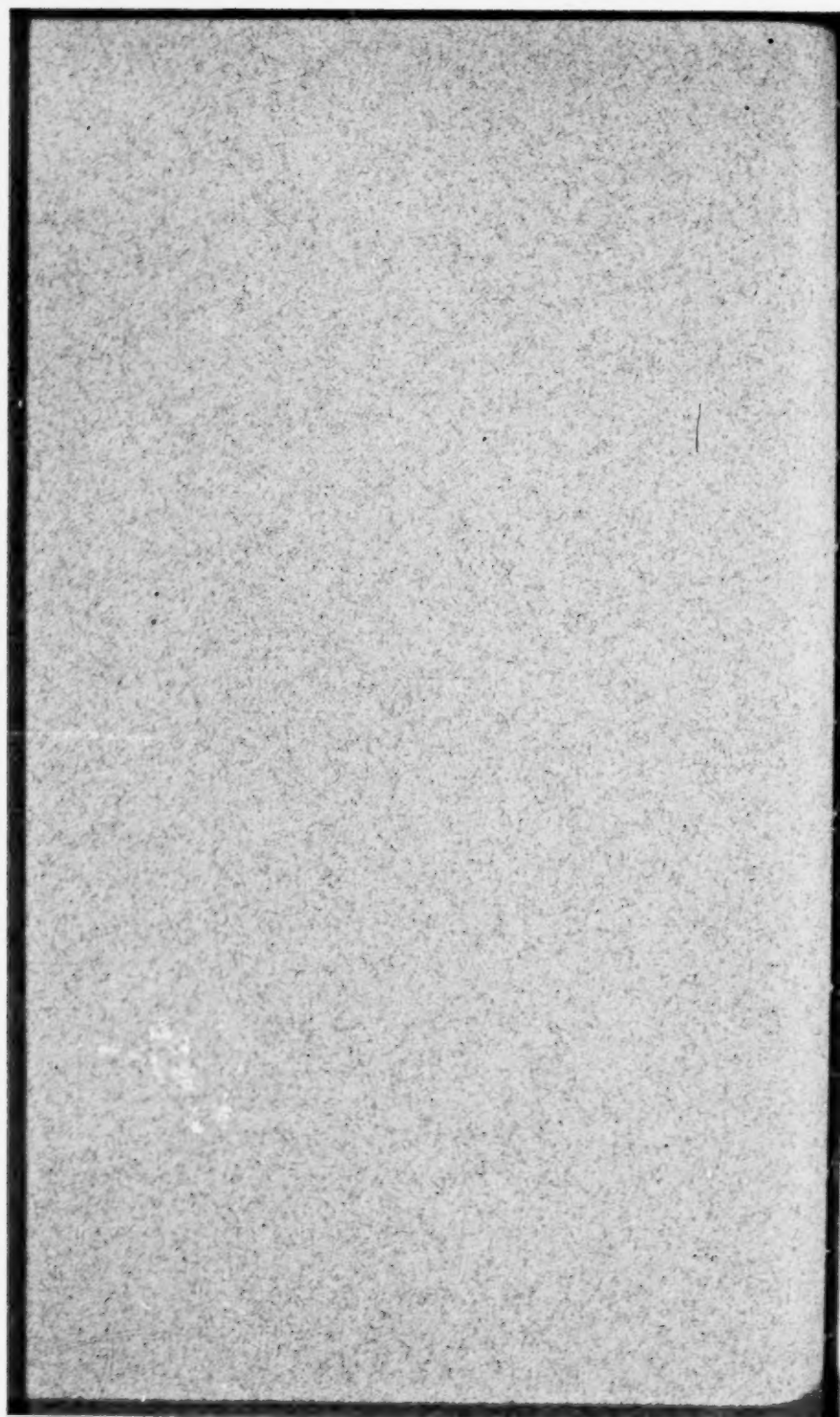


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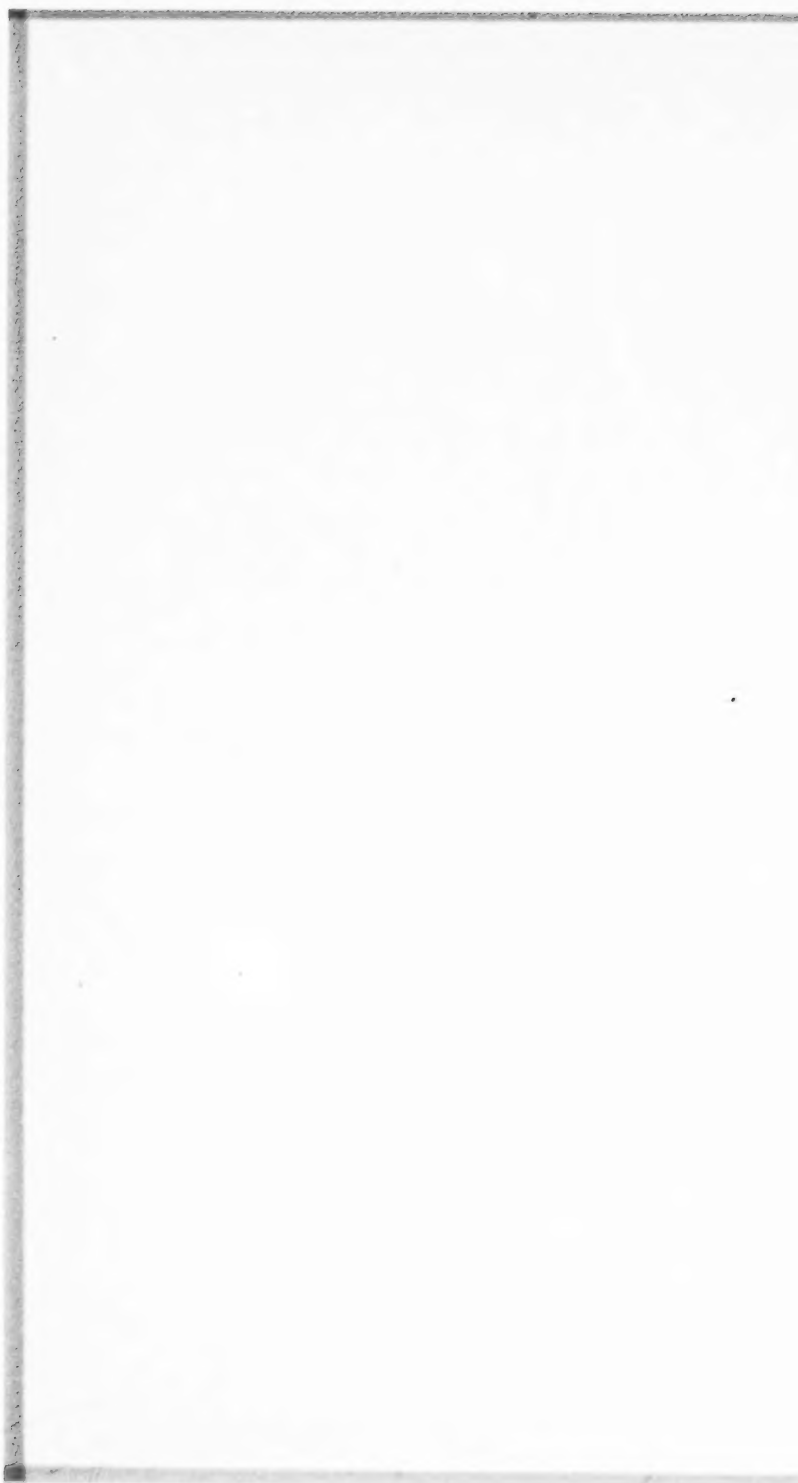


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United States Supreme Court

THE W. S. TYLER COMPANY,	Appellant,	} In Equity.
vs.		
THE LUDLOW-SAYLOR WIRE COMPANY,	Appellee.	

No. 1010 October Term, 1914.

BRIEF FOR APPELLANT ON QUESTION OF JURISDICTION

May it please the Court:

The history of the case is as follows:

On March 12, 1912, appellant brought this action against the appellee in the District Court for the Southern District of New York for alleged infringement of U. S. Patent No. 966,599, granted to Morley P. Reynolds, for a woven-wire fabric for screens, and assigned to the appellant.

The bill of complaint states that appellant is a corporation organized and existing under and by virtue of the laws of the State of Ohio and that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and having a regular and established place of business at No. 30 Church Street, New York City, in the Southern District of New York, at which place the subpoena under such bill was served upon

B. C. Guerin, Eastern representative of said appellee company, in which district the acts of infringement were committed.

Appellee, by its counsel on April 1, 1912, entered a "special appearance for the sole purpose of objecting to the jurisdiction of this Court."

On the 6th day of May, 1912, the day on which an answer was due in said cause, the appellee, by its counsel, presented a motion for an order authorizing and allowing the said appellee to file three separate pleas in abatement, which order was made by the said Court and said pleas were duly filed and each of the same objected to the jurisdiction of the Court to compel the appellee to answer to three distinct causes of action, *viz.*, patent infringement, trade-mark infringement and unfair competition. In all these pleas appellee prays the judgment of the Court whether it shall be required to answer the appellant's bill of complaint on the ground that the bill is not true in that it says that appellee has a regular and established place of business at No. 30 Church Street, Borough of Manhattan, City of New York, in the Southern District of New York; and appellee denies that it has a regular and established place of business at No. 30 Church Street or at any other place in the Southern District of New York.

On October 4, 1912, the Court (by Judge Lacombe, Record, page 20) on hearing allowed the pleas and ordered that the appellee need not answer to so much of the bill of complaint as alleged unfair competition and trade-mark infringement, whereupon appellant on October 5, 1912, filed a replication to the pleas as to patent infringement and placed in issue the question as to whether the appellee had an established place of busi-

ness in the Southern District of New York and should be required to answer appellant's bill of complaint.

October 30, 1912—November 1, 1912, appellant took proofs as disclosed by appellant's record.

Appellee took no proofs.

On the final hearing the Court (by Judge Mayer, Record p. 49) held that appellee did not have a regular and established place of business in the Southern District of New York; that the sale to the Lebedjeff Company was a Missouri sale; that no act of infringement was committed within the Southern District of New York; that the law of the case was to be found in Judge Lacombe's opinion holding the plea good in law, if true; and dismissing the bill.

(An appeal to the Circuit Court of Appeals of the Second Circuit from the decree of the Circuit Court was dismissed on the ground that such appeal should have been taken directly to the Supreme Court, and a petition for certiorari to review such action of the Circuit Court of Appeals is pending before this Court.)

This appeal is taken directly to the Supreme Court from the action of the District Court, Judge Mayer, dismissing the bill.

The appellant seeks to maintain the jurisdiction of the Circuit Court for the Southern District of New York, over the appellee corporation by virtue of the Act of March 3, 1897, 29 Stat., 695, C. 395, which is as follows:

"That in suits brought for the infringement of Letters Patent the Circuit Courts of the United States shall have jurisdiction in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement, and have a regular and established place of business."

It is necessary in order to bring the appellee within the jurisdiction of this Court that it shall have a regular and established place of business in the Southern District of New York, and shall have committed acts of infringement in said district.

Established Place of Business

The appellee had a regular and established place of business at 30 Church Street, New York City, and was there represented by said defendant's Eastern representative, Byram C. Guerin, who testifies as follows (Transcript of Record, p. 22):

"I was the eastern representative of Ludlow-Saylor Wire Company, the defendant in this case. I sold wire cloth manufactured by them and received payment in the form of a salary and commission, traveling expenses were also paid. I solicited orders for the same, which orders were usually addressed to Ludlow-Saylor Wire Co., 30 Church Street, New York; sometimes the additional address was given of B. C. Guerin, Agent. A portion of the entrance door to my office was inscribed with the name of The Ludlow-Saylor Wire Company. My name also appeared on the door without designation."

Appellee's name was also in the New York City telephone directory (p. 32) and the name was properly indexed in the New York City directory (p. 42).

The envelopes used by the witness Guerin for sending mail from the office at No 30 Church Street were inscribed with the words: "If not delivered in 5 days, deliver to the Ludlow-Saylor Wire Co., 30 Church Street, New York." The witness Guerin testifies that this was the usual envelope used for the Ludlow-Saylor Wire Company's business in New York (p. 33).

It is also a fact that the appellee company recognized and advertised this office at No. 30 Church Street as the New York office of the company, as will appear from the Appellant's Exhibit, "Copy of Mining and Engineering World" and "Mining and Scientific Press," which advertisements appear in current magazines or periodicals and are inserted at page 45 of the Transcript of Record, and both of such advertisements under the name of The Ludlow-Saylor Wire Company give the address of the New York office of the company at 30 Church Street.

The witness Guerin testifies that all letters sent out by him from the New York office of the appellee were signed "Ludlow-Saylor Wire Company, B. C. Guerin, Eastern representative" (p. 22).

It also appears and was testified to by the witness Guerin that the office at No. 30 Church Street was used by the Hendrick Manufacturing Company and by the appellee and that each of said parties paid a portion of the rent of the same (p. 22):

"All the time that I was in the employ of the Ludlow-Saylor Wire Company I received a salary and *they paid a portion of the rent of my office.* For a certain period they paid twenty-five (\$25) dollars a month and I think afterwards it was reduced to twelve dollars and fifty cents (\$12.50) a month."

(See also letter to B. C. Guerin, pp. 23 *et seq.*)

On page 23 of the Transcript of Record is the agreement between the appellee and B. C. Guerin in regard to his acting as appellee's Eastern's representative, and such agreement was to cover the first six months of 1911 and was continued beyond that period as appears by letter dated May 29, 1912, from the appellee to B. C. Guerin at page 26.

The witness Guerin also testified that he received order for goods of the appellee at the New York office and that it was customary for him to retain the original order and forward a copy of the same to the appellee at St. Louis after which he received the check or checks at the New York office and forwarded the same to the appellee at St. Louis. The receipt of the remittance was then acknowledged by Guerin from the New York office (p. 22).

It will therefore be seen that the appellee company had an established place of business in New York and in the Southern District thereof, as the door of the office bore appellee's name, which also appeared in the New York City directory and in the New York telephone directory. The envelopes used by the appellee at the New York office bore defendant's return card and the address "30 Church Street," and the letters were signed B. C. Guerin, Eastern representative. The Eastern representative, Guerin, received orders and accepted the same, and also received remittances in payment of the goods shipped on such orders and acknowledged receipt of such remittances. The appellee also paid its part of the rent of the New York office, part of the salary of the stenographer employed and a salary to the Eastern representative, Guerin. Appellee also advertised its branch office at 30 Church Street, New York.

The Ludlow-Saylor Wire Company, the appellee in the cause, has a regular and established place of business in New York City, in the Southern District of New York, so as to give this Court jurisdiction over it if acts of infringement have been committed in said district; in fact it would be almost impossible to add anything to the facts which existed to make the New York office of the Ludlow-Saylor Wire Company a more regular and established place of business.

Infringement

Appellant's contention is that the appellee has infringed certain United States letters Patent No. 966,599, granted to M. P. Reynolds, August 9, 1910, for Woven Wire Fabric for Screens, which was assigned to the W. S. Tyler Company, the appellant, and a copy of said U. S. Letters Patent appears in the Record at page 46.

The witness Cahall, the Eastern representative of the appellant company, testifies that the particular screen manufactured under the above patent has been very satisfactory for all the uses for which it has been sold and such screen was known as "Ton-Cap" and was used principally in mining and in the manufacture of cement (p. 34).

Lebedjeff Sale—The witness Cahall testifies that he personally arranged with Mr. M. C. Fairchild, purchasing agent of the V. V. Lebedjeff Engineering & Supply Company of New York, to purchase some screen from the appellee which was to be exactly like the patented screen of the appellant and for this purpose he submitted to Mr. Fairchild a sample of appellant's "Ton-Cap" which was to be delivered to appellee's office together with an order for screen like the sample. Appellee's screen was known commercially by the name of "Rek-Tang."

The witness Cahall testifies at pages 34 and 35 as follows:

"I directed the purchase of screens from the defendant through the V. V. Lebedjeff Engineering & Supply Company of New York. I called at their office in person and had a verbal conversation with a Mr. M. C. Fairchild, their purchasing agent. I

first advised him that I was desirous of securing possession of a quantity of Rek-Tang screens as manufactured by the Ludlow-Saylor Wire Company, but wished it to be the same or have it stated as being the same as the small sample which I left with him at that time, which was taken from a sample which I had with me of our Ton-Cap screen. I had this sample cut so that Mr. Fairchild could himself readily break a small piece off which was to be sent to Ludlow-Saylor Wire Company's New York house. Mr. Fairchild then wished to know for what purpose this screen was desired. I informed him that it was wanted for experimental and testing purposes however, he could say when asking for quotation that the same was for export to South America, and that I would send him a confirmation to this effect and he stated that in case I would do this he would purchase the screen for me.

"They placed the order with the New York office of the Ludlow-Saylor Wire Company after receiving a quotation from them, sending check in payment for same with the confirming order."

Such witness Cahall then sent the required order to the V. V. Lebedjeff Engineering & Supply Company, a copy of which appears at page 35.

Cahall also testifies (p.35), as shown below, that the screen was duly received at the Lebedjeff Company's office and was sent to the New York office of the appellant:

"These Rek-Tang screens were received by the Lebedjeff Company by express, as per order.

"Mr. Fairchild upon their arrival at the Lebedjeff Company's office telephoned me at our office; however, I was not in at the time. Upon my return I telephoned Mr. Fairchild and he stated that he

had given the express people instructions to deliver them to our office.

"They were delivered to our office and remained there until we moved from 11 Broadway. They are now at our office at 200 Fifth Avenue. They were delivered to me boxed and in good condition. I opened the box at the time and it contained the exact number and size of pieces which I had had Lebedjeff Company order. I obtained a sample of one of these screens from the box by sawing off a piece with a steel saw, which sample I here produce."

Cahall then produced the piece of screen which he had cut from the alleged infringing screen manufactured and the same was offered in evidence and marked "Complainant's Exhibit Sample of Rek-Tang Screen Received Through Lebedjeff." This witness also produced the piece of screen from which he had cut the sample of screen to send to the appellee and the same was offered in evidence and marked "Complainant's Exhibit Ton-Cap Screen From Which the Small Piece Was Given to the Lebedjeff Company."

On pages 37 to 41, inclusive, are copies of the correspondence in the Lebedjeff sale showing the letters from the New York office of the Ludlow-Saylor Wire Company signed with the company's name and with the words "Eastern Representative" or "B. C. Guerin, Eastern Representative."

See stipulation below of counsel for the respective parties, which appears at page 43:

"It is stipulated between counsel that if Mr. M. C. Fairchild were called he would testify that he is purchasing agent of the V. V. Lebedjeff Engineering and Supply Company, that in January, 1912, he received from W. P. Cahall, Eastern Representative of the W. S. Tyler Company, the sample

of screen produced by Cahall and marked 'Complainant's Exhibit, Separated Piece of Screen given to Lebedjeff Company,' that he took this piece from a larger piece also produced by Mr. Cahall and marked 'Ton-Cap Screen from which the small piece was given to the Lebedjeff Company.' That he ordered from the Ludlow-Saylor Wire Company, 30 Church Street, New York City, thirty pieces of wire cloth like 'Complainant's Exhibit, Separated Piece of Screen, etc.,' above referred to, sending such separated piece with his order. That the goods which he ordered were shipped to the Lebedjeff Company from the Ludlow-Saylor factory (at St. Louis, Mo.) as per his order, that he paid for same by check sent to Ludlow-Saylor Wire Company 30 Church Street, New York. That he was informed by the express company of the receipt of the goods and that at the request of Mr. Cahall he had them sent directly from the express company to the W. S. Tyler Company, 11 Broadway, New York, and that the correspondence, invoice, order, etc., offered in evidence by Mr. Cahall were received by the Lebedjeff Company and given to Cahall by Fairchild.

"Counsel for complainant offers in evidence United States Letters Patent No. 966,599, granted on August 9, 1910, to Morley P. Reynolds of Cleveland, Ohio, assignor to the W. S. Tyler Company of Cleveland, Ohio, for woven wire fabrics for screens which is the patent in suit and the same is marked 'Complainant's Exhibit, Reynold's Patent'."

The expert witness Workman (qualified as an expert by stipulation) testifies (p. 45), after going into the specification of the patent in suit in detail, as follows:

"I have examined the sample of wire screen marked 'Complainant's Exhibit, Sample of Rek-Tang Screen Received Through the Lebedjeff

Company' and have compared it with the patent in suit and with each claim thereof; and I find that it is practically an exact copy of the invention described and claimed in this patent. This sample corresponds to the screen specified in claim 1 of the patent in that it is a metallic pressed or rolled fabric, the flattening of the warp and weft wires where they cross indicating this pressing operation. The weft or transverse wires of this sample are, as specified in claim 1, larger than the warp wires, and, as I found by testing, are of softer metal than the warp wires. And the warp wires are pressed into the weft wires and thereby interlocked therewith.

"In the same way I find the features specified in the second claim of the patent embodied in the sample referred to. As this claim, as I have pointed out, is the same as claim 1, except that it omits the specification of the weft wires as being larger than the warp wires, it is not necessary for me to again point them out.

"I also find the several features specified in claims 3 and 4 of the patent embodied in this sample. The only features I need refer to particularly in connection with these two claims in their comparison with the sample is the spacing farther apart of the weft wires, since in other respects these claims are similar to claims 1 and 2. It is obvious from an inspection of the sample that the weft or transverse wires are spaced considerably farther apart than the warp wires and produce an oblong mesh.

"I, therefore, find as a result of a reading of the claims and a comparison of the sample referred to with the several claims of the patent that the sample embodies all the several features of each of said claims and as specified in each of said claims."

The Circuit Court held that this was a sale in Missouri on the ground that the sale was accepted at St. Louis and the goods shipped from there.

But this is not a correct statement of the facts. The sale was *accepted at New York*. After preliminary inquiries as to price, Lebedjeff Company wrote to Ludlow-Saylor Company at "No. 30 Church Street, City," on January 31, 1912 (p. 39), ordering the goods, and

On the next day, February 1 (p. 40), Ludlow-Saylor Company, by Guerin, its Eastern Representative in New York, wrote to Lebedjeff Company, accepting the order and check.

Therefore the sale was *accepted* at New York. Guerin wrote to his company at St. Louis (bottom p. 39) sending, not the original Lebedjeff order but "order No. 86 for the V. V. Lebedjeff Co.", which order is printed at top of page 39 and is merely an unsigned memorandum by Guerin of the order which *he* had received and accepted. The transaction was completed between the Lebedjeff Company and Guerin in New York. The sale was completed and the Ludlow-Saylor Co. bound by the acceptance sent by its New York office.

The record shows other communications from Guerin to his St. Louis office, asking for a price and instructing them as to shipment, and when they did not send a receipt promptly he wrote again, February 19 (p. 40), repeating his instruction; and the record shows that the Ludlow-Saylor Company did send the goods and receipt to Lebedjeff Company; but Lebedjeff Company did not address any inquiry, order, payment or other thing to St. Louis. It ordered the goods in New York, got an acceptance from New York, paid New York and looked to New York to see that the goods and receipt were de-

livered. It was quite uninterested in any communications between the New York and the St. Louis offices of Ludlow-Saylor Company.

It is common, almost universal, with manufacturers doing an interstate business to have a headquarters and factory in one state and to distribute their products from one factory throughout the country or throughout a great number of states. It is unnecessary and would be foolishly extravagant in most cases to have a factory or even to carry a stock of goods in every part of the country in which the company has sales. This is especially the case with goods which have generally been made to order like the wire screens involved in this suit. The mere fact that the goods are made in one district and shipped to a customer in another district cannot free a defendant from the charge of infringement in the latter district. Where the terms of sale were agreed upon in New York and the order was delivered in New York and accepted in New York, such acts constitute a sale in New York (even though one of the conditions of the sale was delivery of the goods f. o. b. St. Louis).

Besides it does not require a complete sale, including delivery of the goods, to constitute an infringement or threat of infringement such as will be enjoined. The Act of 1897, on which jurisdiction is here based does not provide that the defendant must have made a sale and delivery of the goods in the district in which it is sought to establish jurisdiction. The Act provides on this point only that defendant "shall have committed acts of infringement." Now the contract made between Lebedjeff and the New York office of appellee was a contract to infringe appellant's patent and was an act performed in New York and against which the Courts of the New York district should grant relief.

The Act of 1897 must have contemplated sales of this sort as acts of infringement since this is the manner of making sales which is practiced almost universally by companies doing an interstate trade.

On the question of the Lebedjeff transaction we conclude, therefore,

First—That there was a sale consummated in New York;

Second—That such sale constituted an act of infringement committed in New York or a threat of such an act which brought the appellee company within the jurisdiction of the Circuit Court of that district regardless of the place or manner of delivery of the goods.

Other Sales—So much for the particular sale to Lebedjeff Company. This is the only sale which, in the evidence, was traced through from beginning to end. But the statement of Guerin, Eastern Representative of the appellee, shows that he made a great many sales in New York and that the infringing wire cloth was the only goods which he did sell as representative of the appellee. He says, p. 22;

“I sold wire cloth manufactured by them * * * I solicited orders for the same, which orders were usually addressed to Ludlow-Saylor Wire Company, 30 Church Street, New York. * * * In some cases when I received an order for Ludlow-Saylor Wire Company *copies* of the original order were mailed to the company at St. Louis and I retained the original (as he did in the Lebedjeff case, for example) * * * I always acknowledged the receipt of funds in the form of a letter to customers, actual receipts were sent from the home office.”

The sale or contract of sale in all these cases was, therefore, consummated between the customer and the

New York office of appellee. The customer dealt solely with the New York office and held the New York office responsible and the New York office accepted the responsibility.

As to the infringing character of the goods which Guerin was selling for his company see the following (pages 31 and 32):

"I was delegated to sell *wire cloth only*, and authorized to dispose of no other kind of material. It was my practice to take orders both at *prices determined by me* and at prices established by the Ludlow-Saylor Wire Company. Upon receipt of an order I always acknowledged it from this office. I cannot say positively, but I presume that the St. Louis office of the Company acknowledged receipt of orders sent to them from the New York office. When I say that I acknowledged receipt of orders I meant that I informed the customer that the order was received and would be filled, unless his order contained some clause which had not been previously agreed to.

"The style of screen known in the trade as 'Rek-Tang' screen is manufactured by the Ludlow-Saylor Wire Company of St. Louis, Missouri. The style of screen known as the 'Ton-Cap' screen is manufactured by the W. S. Tyler Company of Cleveland, Ohio.

"Q 68. Did you ever sell Rek-Tang screens to customers who had previously been using Ton-Cap screens?

"Object to that question as incompetent, irrelevant and immaterial.

"A. I have sold Rek-Tang screens to customers who have told me that they have used Ton-Cap screens.

"Object to so much of that answer as stated what someone else has told the witness and move that it be stricken out.

"Q 69. In such cases have you ever secured from the customer a sample of the Ton-Cap screen which he told you he had been using?

"The question is objected to as incompetent, irrelevant and immaterial.

"A. Yes.

"Q 70. Then the customer not only told you that he had been using a Ton-Cap screen but gave you a sample of the screen which he had been using?

"A. Yes, sir.

"Q 71. Did you secure such samples by instructions from the St. Louis office or without any instructions concerning the matter?

"Objected to as incompetent, irrelevant and immaterial.

"A. I received instructions to obtain such samples as I could of Ton-Cap screen from the Ludlow-Saylor Wire Company. I also on my own account obtained as many samples as I could of Ton-Cap.

"Q 72. Your last answer is a little obscure and I ask you therefore if you received instructions from the Ludlow-Saylor Wire Company in some cases to obtain such samples of Ton-Cap screens?

"A. Yes, sir, I did.

"Q 73. What did you do with such samples of Ton-Cap screen?

"A. It was forwarded to the Ludlow-Saylor Wire Company at St. Louis, Mo.

"Q 74. Do you know what use they made of them?

"Objected to as irrelevant and immaterial.

"A. If the samples were supplied in connection with an order which had been received the sample was obtained for the purpose of determining the method to be employed in making up screens for the Rek-Tang type, as well as to determine as far as possible the gauge of the wire used and the size of the opening to be made.

"Q 75. You say that these samples were used to determine as far as possible the gauge of the wire and the size of the opening. Were they used also to determine the quality of wire?

"Objected to as irrelevant and immaterial.

"A. I do not know."

We conclude, therefore that in the specific case of the Lebedjeff Company and in the common practice of the New York office of appellee there was infringement of appellant's patent. In fact, the sole business of the New York office of appellee was this infringing business. That this infringement was deliberate, that appellee's knew perfectly what it was doing is clear from appellee's letter to Guerin, dated March 4, 1912 (p. 30) suggesting to him that it would have been better for him to say that he was a broker when he was served with notice of this action. If such a subterfuge as the appellee adopted in the present case is to deprive the Courts in the district where the fraud is perpetrated of jurisdiction over the perpetrator of the fraud it will be practically impossible to reach an infringer except in the district in which his factory is located and the Act of 1897 will have failed of its purpose to facilitate the prevention of infringements by persons whose home districts are remote. The purpose of the Act is to save a patent owner from the expense and difficulty of going a long way back to the root of the infringement and to permit him to stop the growth thereof at the point where it is most easily accessible and is doing the greatest injury.

Brief of Law

By reference to the letter from B. C. Guerin, Eastern representative of the appellee company to the Lebedjeff Company, dated January 31, 1912 (p. 38), it will be

seen that the order was solicited by said Guerin and was later received by him and acknowledged by letter of February 1, 1912 (p. 39), so that the contract was closed by said appellee through their agent, and the Lebedjeff Company.

In *Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.*, 118 Fed., 852, C. C., S. D. N. Y., Judge Lacombe said:

“As to the question of jurisdiction, the only controversy is whether or not an infringing device was sold in the City of New York by the defendant, which concededly has a regular place of business here. This is to be decided, not by the assertions of conclusions which are to be found in the affidavit, but by the facts of the transaction. It seems entirely plain that an offer to buy the infringing device at a named price was made in this city by the purchaser to an agent of the defendant in defendant's regular place of business, and that such agent on behalf of defendant accepted such offer, thus closing a contract of sale, without reference to the headquarters of defendant in Philadelphia. The two telegrams disclose only that the agent asked headquarters if a drill could be shipped on a certain day, and that he was informed that it could, whereupon he himself accepted the purchaser's offer, without receiving or asking for any further authority from headquarters than he apparently already possessed; and that authority was evidently quite sufficient, for, on the strength of the sale the agent had made, the defendant shipped the drill. The facts are not the same as in *Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.* (C. C.), 116 Fed., 641.

“There is no force in the suggestion that the sale was made to a purchaser who bought in the interest of complainants, in order to secure proof of in-

fringement. We are not now dealing with any question of damages, but with the mere fact of sale of a device made in conformity to the patent. The sale of such a device is an act of infringement, although it may be made under such circumstances that complainants cannot recover damages for it."

See also *American Stoker Company v. Underfeed Stoker Company*, 182 Fed., 642 (1910).

In the case of *Westinghouse Company v. Stanley*, 116 Fed., 641 (1902), Judge Lacombe, in the Circuit Court of the Southern District of New York, held that where an agent of a foreign corporation, having a regular and established place of business in such district, but who has no power to bind it to terms of sale, but solicited proposals for machines manufactured in another state, which proposals were invariably forwarded to the factory, where the sales were completed and delivery made, did not show complete acts of infringement in such district, so as to give such Court jurisdiction to issue an injunction against the defendant.

It will be noticed, however, that in the above case the defendant's agent received *proposals*, which *proposals* were sent to the factory, where the sales were completed, while in the present case the sale was completed in New York by B. C. Guerin, Eastern representative of the Ludlow-Saylor Wire Company, the appellee in this cause.

However, even where the orders for an infringing article were taken by an agent and sent to the home office of a foreign corporation for acceptance, Judge Wheeler, in the same Court, *viz.*, the Southern District of New York, three years later ruled that such a transaction would constitute an infringement in the district where the order was taken, in order to bring the defendant within the provisions of the Act of 1897.

Westinghouse Company v. Stanley Company, 121 Fed., 101 (1905). The facts and the conclusion are stated in the syllabus as follows:

“Defendant corporation was organized under the laws of the State of New Jersey, and its manufacturing plant and general offices were in Massachusetts. It maintained an office in New York City, where orders were taken for goods, which were forwarded to the general office and, if accepted, the goods were then delivered on board cars for shipment to the purchaser. *Held*, that a suit for infringement of a patent by machines so made and sold by defendant through its New York office, and shipped to the purchaser in New York City for use there, could be maintained in the Southern District of New York, under the Act of March 3, 1897, 29 Stat. C. 395 (O. S. Comp. St. 1901, p. 589), giving jurisdiction of such suits in a district where defendant shall have committed acts of infringement and have a regular and established place of business.”

There can certainly be no doubt as to the fact that the appellee had an established place of business in the Southern District of New York and under the circumstances set forth would be estopped to deny the agency of B. C. Guerin, Eastern representative.

Again, in the following case, Judge Hand, in the Circuit Court of the Southern District of New York accepts Judge Lacombe's decision in *Westinghouse Co. v. Stanley*, 116 Fed., 641, as the preferable on principle, but overrules the plea on the ground that the defendant was estopped to deny the agency by acts and by their allowing the New York agent to represent himself as the Eastern representative of the defendant. This case is precisely in point with the present controversy, and the ap-

pellee, The Ludlow-Saylor Wire Company should be estopped from denying the agency of B. C. Guerin as its Eastern representative.

Chadeloid Chemical Co. v. Chicago Finishing Co. et al., 180 Fed., 770 (1910). The facts and conclusion are correctly stated in the syllabus as follows:

“Defendant’s agent maintained an office in New York, paying his own rent and stenographer, from which defendant’s wares were advertised without protest. Defendants used such office as their own when they wished to press slow debtors. They permitted the agent to advertise and represent that he was their Eastern agent, and from this office many sales were made, though most of the sales were concluded at the corporation’s home office in Chicago. *Held*, that the corporation had a place of business in New York, and was therefore subject to suit there.”

It will be noticed that in the above case the agent paid his own rent and stenographer, while in this case this was paid by the appellee and the office was advertised by the appellee as their New York branch.

It cannot be seen in what way the appellee can successfully escape liability under the Act of 1897, as the “regular and established place of business” and the “act of infringement” have been proved by the appellant’s witnesses beyond a shadow of doubt, and the said appellee deliberately and knowingly did infringe the appellant’s aforesaid letters patent, and even suggested to the witness Guerin that it would have been better for him to perpetrate a fraud by saying that he was a broker. (See letter from Frank Low, vice-president, to B. C. Guerin, New York City, March 14, 1912, p. 30).

The evidence proving that the appellee had a regular and established place of business in this district and also

committed acts of infringement in this district, is conclusive, and the appellee has introduced no proofs whatever, and hence has not negatived it.

In view of the glaring facts that the appellee undoubtedly had an established place of business in the Southern District of New York, and that acts of infringement were actually committed in said district, the appellant should not have been subjected to the delay and expense of proving the same, so that the costs of this entire proceeding should be placed on the appellee.

Therefore, it is respectfully submitted to this Honorable Court that the appellee has a "regular and established place of business" in the Southern District of New York, and has committed "acts of infringement" in said district, so that the said appellee should be required to file its answer to appellant's bill of complaint forthwith.

Respectfully submitted,
J. NEGLEY COOKE,
D. ANTHONY USINA,
CHARLES C. LINTHICUM,
Counsel for Appellant.

September, 1914.

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Office Supreme Court, U. S.

FILED

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JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

THE W. S. TYLER COMPANY,
APPELLANT,

VS.

LUDLOW-SAYLOR WIRE COMPANY,
APPELLEE.

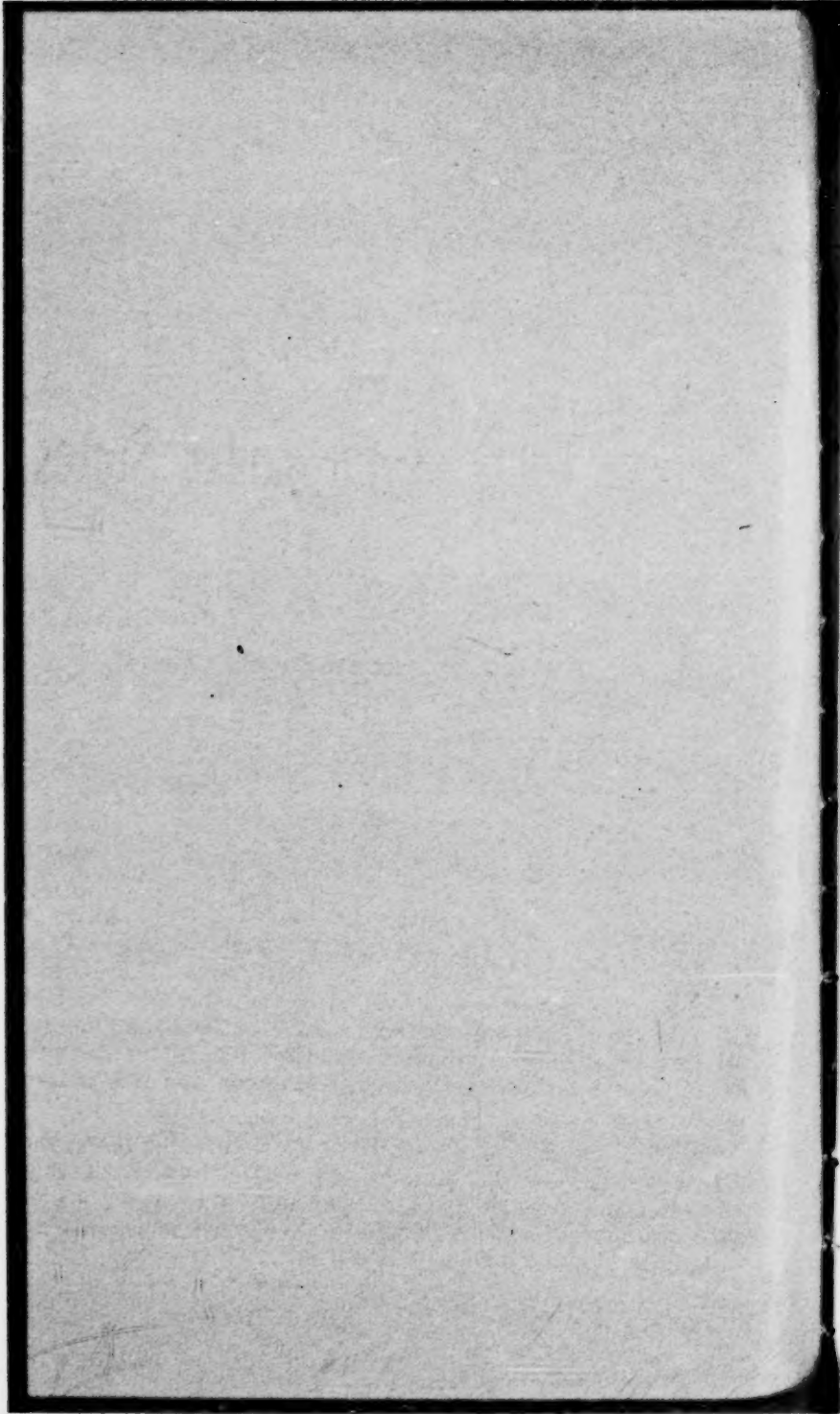
} In Equity.

} No. 441.

BRIEF FOR APPELLEE.

JAS. P. DAWSON,
Solicitor for Appellee.

Wm. E. Garvin,
Of Counsel.



IN THE

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THE W. S. TYLER COMPANY,	} In Equity.
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vs.	
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APPELLEE.	} No. 441.

STATEMENT.

This suit is one for alleged infringement of a patent.

The sole question presented by the Appeal is whether the District Court of the United States for the Southern District of New York had jurisdiction of the case. It was and is conceded that the complainant-appellant is a resident and inhabitant of the Eastern Division of the Northern District of Ohio and a citizen of the State of Ohio; and that the defendant-appellee is an inhabitant and resident of the Eastern Division of the Eastern District of Missouri and is a citizen of Missouri.

The bill charged, in an effort to show jurisdiction in the District Court for the southern district of New York, that the defendant-appellee had a regular and established place of business in the Southern District of New York and had committed acts of infringement there.

See section 48 of the Judicial Code.

To the bill the defendant appellee by leave of court filed its plea to the jurisdiction setting up that it had no regular and established place of business in the southern district of New York and that it had committed no acts of infringement there. (Transcript of record p. 8 et seq.)

This plea was filed before the new equity rules went into effect.

Included in the bill charging infringement of a patent were also charges of unfair competition and infringement of an unregistered trade-mark. Separate pleas were also filed by leave of Court to so much and to such parts of the bill as charged unfair competition and infringement of trade-mark. These pleas were sustained and the correctness of the court below in sustaining them is not in controversy on this appeal.

The plea to so much of the bill as charged infringement of patent was also sustained, but complainant-appellant was given leave to file its replication to that plea and make an issue of fact.

The opinion of Judge Lacombe (unreported) sustaining these pleas is as follows:—

“Complainant is a citizen and resident of Ohio; defendant is a citizen and resident of Missouri. The bill joins three causes of action, namely: for infringement of patent; for infringement of unregistered trade-mark and for unfair competition. Pleas to the jurisdiction of this Court are interposed and this proceeding is to test their sufficiency, their averments, at this stage of the case, being taken as true. It does not appear that any contract for the sale of alleged infringing devices has been made here. Defendant's agent merely solicits orders which are transmitted to Missouri, where their acceptance or rejection is decided upon. The facts are identical with those in *Westinghouse Electric Company v. Stanley Electric Company*; 116 F. R. 641; I do not

find in the latter case with the same title 121 F. R. 101, nor in any of the other authorities cited by complainant (Chicago Pneumatic Tool Company vs. Philadelphia Tool Company 118 F. R. 852; American Stoker Company vs. Underfeed Stoker Company, 182 F. R. 642; Chadeloid Chemical Company vs. Chicago Finishing Company, 180 F. R. 770) anything which induces me to modify the views expressed in 116 F. R. 641 *supra*. Accepting the averments of the plea as true no act of infringement of the patents, within the terms of the statute, is shown within this district.

As to the other two causes of action there is manifestly no jurisdiction, since the only ground for bringing suit in a federal court is diversity of citizenship and this district is not the place of residence of either party.

The pleas are good on their face. Ordered accordingly. See Transcript of Record, p. 20.

The Court will note that Judge Lacombe in this opinion mentions every case cited in Complainant's Appellant's brief on this appeal.

Thereafter the complainant-appellant joined issue on the plea to so much of the bill as charged patent infringement, (Transcript of record p. 21) and took evidence thereon. (Transcript of Record pp. 22 to 48 both inclusive.)

The complainant having, in the judgment of defendant's counsel, entirely failed to establish facts sustaining the jurisdiction, but on the contrary, the evidence taken being in substantial accordance with the averments of the plea, they declined to cross-examine complainant's witnesses, or to take any evidence on the part of defendant, and the questions of fact arising on the plea to the jurisdiction were submitted on the evidence taken by complainant-appellant.

Thereafter the hearing of the plea on the facts came on to be heard before the Honorable J. M. Mayer, District Judge, and the findings of fact were also for defendant-appellee.

Judge Mayer's memorandum of findings of fact and opinion (Transcript of Record p. 49) ~~as~~ as follows:

"On the evidence I am of the opinion that the defendant has sustained the allegations of the plea that the defendant did not have a regular and established place of business in this District.

The sale to Lebedjeff Company was accepted at St. Louis and the goods were shipped from there. On the facts, I am satisfied that the sale was a Missouri sale, and, consequently, that an act of infringement was not committed within the Southern District of New York.

Upon these conclusions as to the facts, the law of the case is to be found in Judge Lacombe's opinion (C. R. XXXI).

I think that under the new Equity Rules defendant is entitled to the dismissal of the bill.

July 8, 1913.

J. M. MAYER,
District Judge."

The final decree dismissing the bill is to be found on page 50 Transcript of Record.

Subsequently an appeal was taken to the United States Circuit Court of Appeals in and for the Second Circuit; but on the 13th of March, 1914, the Circuit Court of Appeals dismissed the appeal holding that it had no jurisdiction to entertain it, under the provisions of sections 128 and 238 of the Judicial Code, as interpreted by this Court (Transcript of Record in the Certiorari case, p. 56).

Thereafter complainant-appellant filed its petition for an appeal to this Court (Transcript of record, p. 52).

As hereinbefore stated the sole question brought up by this appeal is whether the District Court of the Southern District of New York had jurisdiction to entertain and determine the alleged cause of action for infringement of patent set up by the bill.

But the complainant-appellant has filed in this Court a petition for a writ of certiorari to be addressed to the Circuit

Court of Appeals for the Second Circuit, which petition has been ordered by this Court to be set down for consideration at the same time as the hearing upon the appeal. By the application for a certiorari complainant seeks to challenge the correctness of the ruling of the Circuit Court of Appeals for the Second Circuit, holding that it had no jurisdiction to determine the question involved and that an appeal lay direct from the District Court to this Court. The opinion of the Circuit Court of Appeals was as follows:

“Per Curiam:

The District Court sustained the pleas to the jurisdiction as to the causes of action based on trade-mark and unfair competition, but allowed a replication to be filed to the plea in respect to the cause of action on infringement. This was the proper practice under old rule in equity 33 then in force. The issue on the plea was tried and the Court sustained the plea and dismissed the bill. This is the proper practice under new rule 29. From that decree an appeal was taken to this court, but it should have been taken to the Supreme Court. See secs. 128 and 238 of the Judicial Code. *Mechanical Appliance Co. vs. Castleman*, 215 U. S. 437, and *Herndon-Carter Co. vs. Norris & Co.* 224 U. S. 496.

The appeal is dismissed.”

See Transcript of Record in the Certiorari Case, p. 56.

The Certiorari case (No. 622) having been postponed to the hearing of this case, counsel has included in this brief, a brief argument and cited a few authorities in support of the jurisdiction of this Court, to entertain the appeal, and in support of the action of the Circuit Court of Appeals for the Second Circuit in dismissing the appeal taken to that Court.

POINTS AND BRIEF OF ARGUMENT.

Point I.

The District Court of the Southern District of New York did not have jurisdiction for the reason that neither the complainant nor the defendant was an inhabitant of that District, and the defendant did not have any regular or established place of business therein, nor had it committed any act of infringement therein.

Section 48 Judicial Code.

Defendant-appellee relies upon the correctness of the findings of Judge Lacombe sustaining the plea to the jurisdiction hereinbefore set out and upon the case of Westinghouse vs. Stanley Mufg. Co. 116 F. R. 641, and upon the findings of fact by Judge Mayer hereinbefore set out—

As to the question whether the defendant-appellee had a regular and established place of business within the Southern District of New York, we call attention to the cases of Green vs. C. B. & Q. R. R. Co. 205 U. S. 530 and Miller vs. Railroad Company, 113 F. R. 502.

The question before District Judge Mayer was whether the plea to so much of the bill as charged infringement of patent having been declared by Judge Lacombe to be good on its face and sufficient in law, the testimony had disclosed a state of facts substantially different from the facts set up by the plea.

The complainant in order to have sustained the jurisdiction of the District Court must have established two things, namely:

(a) That the defendant at the time of the filing of the bill had a regular and established place of business within the Southern District of New York; and (b) that it had committed acts of infringement there.

The existence of both such facts was essential to give the District Court jurisdiction. Complainant-Appellant con-

cedes this (see top of page 4 appellant's brief). The Court below found that Complainant-Appellant had established neither.

As to whether the defendant had committed any acts of alleged infringement within the Southern District of New York, we submit that there was an utter failure of proof, to show any such infringement. On the contrary, the evidence which was taken and which appellant relied upon to show infringement within the District, established affirmatively that there was no such infringement and the facts proved were in exact accord with the averments of the plea in that regard.

Infringement can be committed in but three ways: (a) by manufacture; (b) by sale; or (c) by use.

There was and is no pretense on the part of the complainant-appellant that there had been any infringement by either manufacture or use. Its efforts were confined to showing one alleged sale, namely, that to the Lebedjeff Engineering & Supply Company. This was not a bona fide sale in the regular course of business, but was a decoy affair, designed and carried out by the complainant for the express purpose of attempting to give the District Court of the Southern District of New York jurisdiction. But even so, it failed miserably to show any sale (even a decoy sale) in the Southern District of New York and succeeded only in showing a sale completed in the eastern district of Missouri.

The correspondence shows that on the 25th day of January, 1912, the Lebedjeff Company addressed an inquiry to the Ludlow-Saylor Wire Company at No. 30 Church Street, New York City, enclosing a sample of wire cloth asking prices upon thirty pieces of the same, disingenuously stating that it was for export shipment to South America (Transcript of the Record p. 38). That this inquiry was received by B. C. Guerin, who was the agent of the defendant-appellee to the extent only and in the sense shown by the averments of the plea. (For plea see Transcript of the Record, p. 8 et seq.) That immediately upon receipt of this inquiry, and on the 26th day of January, 1912, Mr. Guerin transmitted it

to the defendant-appellee at St. Louis, Missouri, where its factory and offices are, and asked that he might be given a price to quote to the Lebedjeff Company. (Transcript of the Record p. 37.) Under date of January 29th, 1912, the defendant from its home office and factory in the City of St. Louis, Missouri, replied to Mr. Guerin and authorized him to quote on the goods asked for a price of 32 cents per square foot *f. o. b., St. Louis*. (Transcript of record p. 38.)

After receiving the last mentioned letter, Mr. Guerin under date of January 31, 1912, addressed a note to the Lebedjeff Company, quoting it a price of 32 cents per square foot *f. o. b. St. Louis, Missouri* (Transcript of the record p. 38).

Under date of January 31, 1912, the Lebedjeff Company wrote again to the defendant-appellee addressing it at No. 30 Church Street, New York City, asking it to enter its order for the goods desired, *and to ship the same from factory and by express. Collect*. (Transcript of record p. 39). Under date of February 1st, 1912, Guerin transmitted this order to the defendant-appellee at its factory and home office, St. Louis, Missouri, and also the check of the Lebedjeff Company to the order of the defendant-appellee in payment for same and asked that the defendant-appellee would mail receipted invoices direct from St. Louis to the Lebedjeff Company (Transcript of the record p. 39). Accompanying this letter to the defendant-appellee was a sale slip also dated February 1st, 1912, (Transcript of the record top of p. 39) and also under date of February 1st, 1912, Mr. Guerin wrote to the Lebedjeff Company acknowledging receipt of order and of their check in payment (Transcript of record p. 40). Under date of February 5, 1912, the defendant by its Vice-President, Frank Low, acknowledged from St. Louis, Missouri, to Mr. B. C. Guerin, the receipt of the Lebedjeff order (Transcript of record p. 40) and on the same date, the defendant-appellee from its St. Louis office also wrote the Lebedjeff Engineering and Supply Company direct, acknowledging receipt of the order through Mr. Guerin and stating that it would make shipment within ten days, and also stating that *the goods would have to be made to order as defendant-appellee did not carry them in stock*. (Transcript of record p. 40).

Under date of February 19, 1912, Mr. Guerin wrote the defendant-appellee asking it to send the Lebedjeff Company receipted invoices for the goods ordered (Transcript of record p. 40) which request the defendant-appellee complied with, and sent the receipted invoices from its office at St. Louis, under date of February 3rd, 1912. (Transcript of record top of p. 41). It was stipulated (Transcript of record, page 43) *that the goods ordered were shipped to the Lebedjeff Company from the Ludlow-Saylor Wire Company's factory at St. Louis, Missouri as per its order—that is, by express,* and that when the Express Company notified the Lebedjeff Company of the arrival of the goods in New York, the Lebedjeff Company at the request of Mr. Cahall, complainant-appellant's representative, had them sent directly from the Express Company to the complainant-appellant's office No. 11 Broadway, New York City.

The foregoing are the material facts with regard to the Lebedjeff Company's transaction.

This Lebedjeff Company's transaction was the only transaction which complainant endeavored to show constituted an infringement, and the sample alleged to have been taken from the goods shipped to the Lebedjeff Company was the only sample which was submitted to the expert produced by the complainant-appellant in an effort to show that the goods sent to Lebedjeff were an infringement of complainant-appellant's patent. (See Workmans testimony Transcript of Record p. 43).

With regard to the general course of his business for the Ludlow-Saylor Wire Company, Guerin testified (Transcript of record p. 22). "In some cases when I received an order for the Ludlow-Saylor Wire Company, copies of the original order were mailed to the Company at St. Louis and I retained the original. In other cases, a copy of the original order together with the original received were mailed to the Company at St. Louis. *Relative to filling the actual orders received would state that I had no part in this operation. It was my duty to solicit orders, forward them when received*

to the home office for execution. The orders were paid for by those making the purchases.

Guerin also testified that he never carried any goods of the defendant in stock in New York, out of which orders could be filled. Guerin merely took orders and forwarded them to St. Louis, where they were accepted or rejected and where if accepted they were filled.

It is submitted that this evidence shows affirmatively that the sale to the Lebedjeff Company was a Missouri sale, and not one made in the Southern district of New York. The facts shown are in exact accord with the averments of the plea.

The sale was completed when the goods were delivered to the Express Company at St. Louis in accordance with the purchaser's instructions. All that preceded had been negotiations leading up to a sale and title did not pass until delivery was made to the Common Carrier as per the instructions of the buyer. A sale is completed only when the title to the thing sold passes from the seller to the buyer.

Counsel respectfully submit that the opinion of Judge Lacombe in the case of Westinghouse Electric & Manufacturing Company vs. Stanley Electric & Manufacturing Company, 116 F. R. 641, enunciated the correct principle of law applied in a case substantially identical with the present.

Judge Lacombe there said:

"But when the commission of an act of infringement is essential to jurisdiction, the completed act must be proved. There must be proof either of a manufacture, a use or a sale within the District; contracts to manufacture, threats to use, negotiations for a sale will not be sufficient, for the reason that the Statute requires proof of the completed act. There is no pretense of infringement in this District by any manufacture or use and the testimony falls short of proving an actual sale here.

Representatives of the defendant Company have entered into negotiations in this city for sales of the machines which

are manufactured at Pittsfield, Massachusetts but none of these representatives have had power to bind complainant to terms of sale. The purchasers' proposals have invariably been forwarded to Pittsfield and there accepted by the defendant and delivery made. The completed act of alleged infringement by sale is therefore not committed in the Southern District of New York, and this Court is consequently upon the proof as it stands without jurisdiction to issue an injunction against the defendant corporation".

Point II.

This Court has exclusive jurisdiction of the appeal, and the action of the Circuit Court of Appeals for the Second Circuit in dismissing the appeal taken to that Court was proper.

Counsel for defendant-appellee submit that the provisions of section 238 of the Judicial Code are conclusive in favor of the jurisdiction of this Court and against the jurisdiction of the Circuit Court of Appeals.

So much of that section as is pertinent to the matter under discussion is as follows:

"Section 238. Appeals and writs of error may be taken from the District Courts * * * direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision".

This statute has been construed by this Court in the following cases: *Excelsior Wooden Pipe Co. vs. Pacific Bridge Company* 185 U. S. 282; *Louisville Trust Company vs. Knott*, 191 U. S. 233; *Mechanical Appliance Company vs. Casselman*, 215 U. S. 437; *U. S. vs. Larkin*, 208 U. S. 333; *Foreriver Shipbuilding Company vs. Haag*, 219 U. S. 175; *United States vs. Jahn*, 155 U. S. 109; *Herndon-Carter Co. vs. Norris & Co.* 224 U. S. 496.

In the case of *United States vs. Jahn*, *supra*, at page 114, this Court per Fuller, C. J. said in discussing the cases in which appeals lie from the Circuit Court (now district court) directly to this Court, "Giving the act a reasonable construction taken as a whole, we conclude: (1) If the jurisdiction of the Circuit Court is in issue, and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this Court".

In *Mechanical Appliance vs. Casselman* *supra*, where the question was whether defendant was subject to service of process at the place where served, this court (p. 440) said:

"It is settled that a question of this character involves the jurisdiction of the Circuit Court as a Federal Court, and may be brought here by writ of error under section 5 of the Court of Appeals act of 1891, as amended in 1897. *Remington vs. Central Pacific Railway Company*, 198 U. S. 95".

And the opinion in the case of *Herndon Carter Company vs. Norris & Company* *supra*, was to the same effect.

And in *United States vs. Larkin*, *supra*, (pp. 339 & 340) this Court said: "Where the question of the jurisdiction of the Circuit or District Court of the United States as a court of the United States is in issue, and is certified to this Court under section 5 of the act of 1891" (the provisions of which are now incorporated in section 238 of the Judicial Code) "whereby no other question can be considered our jurisdiction is exclusive".

The case of *Fair vs. Kohler Die & Specialty Company*, 228 United States 22, was a patent case. There was an appeal from the decree of the Court below to this Court on the question of jurisdiction alone. It was held that the appeal was properly taken to this Court.

All of which is respectfully submitted,

JAS. P. DAWSON,
Solicitor for Defendant-Appellee.

Wm. E. Garvin of Counsel.

DEC 11 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 441.

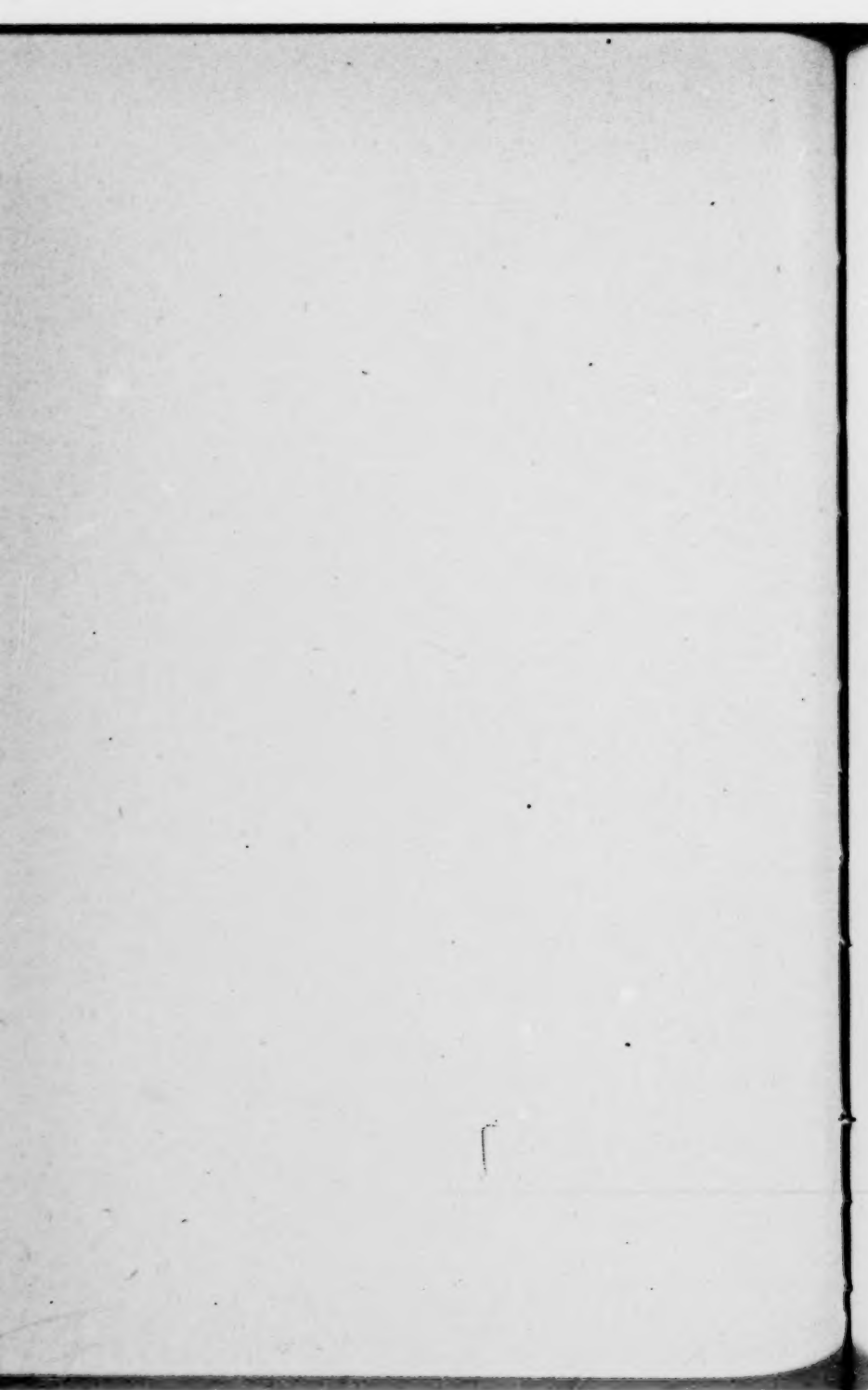
THE W. S. TYLER COMPANY, APPELLANT,

vs.

LUDLOW-SAYLOR WIRE COMPANY, APPELLEE.

PRINTED ARGUMENT ON BEHALF OF THE
APPELLEE.

JAS. P. DAWSON,
Solicitor for Appellee.



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ARGUMENT FOR APPELLEE.

Counsel for appellee would be content to submit this case upon the brief already filed, but for certain inaccuracies in appellant's brief, to which he intended to call the attention of the court in oral argument, but which now that he is to submit the case without oral argument he desires to bring to the attention of the court in this way.

One B. C. Guerin, who was formerly in the employ of appellee, but who was called as a witness by appellant, in speaking generally of the scope of his authority, testified (see Transcript of the Record, p. 22), "I sold *wire cloth* manufactured by them" (appellee) "and received payment in the form of a salary and commission; traveling expenses were also paid. I solicited orders for the same, which orders were

usually addressed to Ludlow-Saylor Wire Company, 30 Church street, New York; sometimes the additional address was given of B. C. Guerin, agent. A portion of the entrance door of my office was inscribed with the name of the Ludlow-Saylor Wire Company. My name also appeared on the door without designation. In some cases when I received an order for Ludlow-Saylor Wire Company copies of the original order were mailed to the company and I retained the original. In other cases a copy of the original order, together with the original received, were mailed to the company at St. Louis. *Relative to filling the actual orders received would state that I had no part in this operation. It was my duty to solicit orders, forward them when received to the home office for execution.* The orders were paid for by those making the purchases. In some cases the remittance was sent direct to the Ludlow-Saylor Wire Company at St. Louis; in other cases the payment was made through me. When the payment was made through me I received the check and in turn sent it forward to the company at St. Louis.

The check was never drawn to me personally. I always acknowledged the receipt of funds in the form of a letter to customers, actual receipts were sent from the home office."

An abbreviated version of the foregoing quotation appears on page 14 of appellant's brief, and counsel for appellant on the same page uses the following language and then gives the abbreviated quotation as authority for it, viz., "But the statement of Guerin, eastern representative of the appellee, shows that he made a great many sales in New York, and that the infringing cloth was the only goods which he did sell as representative of the appellee." And on page 17 of appellant's brief appears a similar unwarranted conclusion, viz., "We conclude, therefore, that in the specific case of the Lebedjeff Company, and in the common practice of the New York office of appellee there was infringement of appellant's patent. In fact the sole business of the New York office of appellee was this infringing business."

These conclusions of appellant's counsel are unsupported by the record. They are apparently based on the first line of the quotation found on page 14 of appellant's brief, viz., "I sold wire cloth manufactured by them," and on the first sentence of another quotation from Guerin's testimony found on page 15 of appellant's brief, as follows: "I was delegated to sell *wire cloth only* and authorized to dispose of no other kind of material."

From these statements of Guerin that he sold "wire cloth" and "wire cloth only" appellant's counsel jump to the conclusion that all sales of *wire cloth* by Guerin were infringements of appellant's alleged patent. For such a conclusion to be justified appellant's alleged patent would have to be basic and broad enough to cover every sort of wire cloth. But the making of wire cloth is a very old art, and appellant's patent, which purports to cover only "an improvement in woven wire fabric for screens," if it has any validity whatever, which appellee denies, is of the narrowest possible scope, as the court will discover by an examination of its claims. As a matter of fact appellee is one of the largest manufacturers in the country of every species of wire cloth, and the fact that it manufactures a number of kinds of wire cloth appears on page 23 of the transcript of record, the very next page to the one from which the quotations in appellant's brief were taken, where, on a letter-head of the Ludlow-Saylor Wire Company, on which was written a letter, introduced by the appellant, it appears that the appellee is the "manufacturer of the 'Perfect' double-crimped wire cloth, and mining screen, poultry and farm fences, window screen cloth and Hex nettings," neither of which it is pretended is an infringement of appellant's alleged patent. And it also appears from appellee's advertisements which appellant introduced in evidence that appellee has been making wire screens for fifty-five years, and in which it advertises its "Perfect double-crimped mining screens," which it is not even pretended are infringements of appellant's screens. (See pp. 81 and 82, Transcript of

Record.) Besides it does not appear that Guerin ever made a sale of any kind of goods of appellant, either alleged infringing or non-infringing goods, in the southern district of New York, or that he ever did more in any case than to solicit orders and forward them to St. Louis, at which place, if the orders were accepted, they were filled and the goods delivered. The defendant kept no goods in New York from which deliveries ever were made or could be made. There is no conflict of evidence; in fact appellant took no evidence and did not even cross-examine appellant's witness. Guerin never had any goods in New York from which to fill orders. He only had samples. His testimony is plain and conclusive. He said, as already quoted, "Relative to filling the actual orders, would state that I had no part in this operation. It was my duty to solicit orders forward them when received to the home office for execution" (Transcript, p. 22). And again, page 32, "I never carried enough wire cloth to fill an order directly." Even the appellee did not keep the alleged infringing goods in stock at St. Louis. (See letter of appellee dated February 5, 1912, Transcript, p. 40.)

We do not believe that appellant will seriously contend that there is any evidence in the record which tends to prove an infringing sale, except in the Lebedjeff case. In fact the appellant substantially admits as much, when, on page 14 of its brief, it says: "So much for the particular sale to the Lebedjeff Company. *This is the only sale which in the evidence was traced through from beginning to end.*"

The court below never considered there was any evidence of any other alleged infringing transaction, and we are confident that this court will not find any such.

With this printed argument to be read in connection with its brief heretofore filed, the appellee respectfully submits the case on its part.

JAS. P. DAWSON,
Solicitor for Appellee.